Supreme Court, U.S.
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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

HUGHES AIRCRAFT COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN J. HIGGINS
HUGHES AIRCRAFT COMPANY, INC.
7200 Hughes Terrace
P.O. Box 80028
Los Angeles, CA 90090

KENNETH W. STARR
Counsel of Record
CHRISTOPHER LANDAU
KIRKLAND & ELLIS
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-5000

JOSEPH E. PAPELIAN
GENERAL MOTORS CORP.
3031 West Grand Boulevard
P.O. Box 33122
Detroit, Michigan 48232

Attorneys for Petitioner

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QUESTIONS PRESENTED

1. Can a corporation be convicted of conspiring with itself under the general federal conspiracy statute, 18 U.S.C. § 371?

2. Has this Court implicitly overruled the traditional common-law rule that a jury cannot convict a party of conspiracy while simultaneously acquitting an indispensable party to that conspiracy?

PARTIES TO THE PROCEEDING

Petitioner, Hughes Aircraft Company, Inc., was appellant below. Respondent, the United States of America, was appellee below.

Pursuant to this Court's Rule 29.1, petitioner notes that it is a wholly-owned subsidiary of GM Hughes Electronics Corporation ("GMHE"). GMHE, in turn, is a wholly-owned subsidiary of General Motors Corporation, which has issued various classes of shares to the public. The earnings of GMHE are used to calculate the earnings per share of General Motors Class H common stock (New York Stock Exchange: GMH).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

PERTINENT STATUTORY PROVISION 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. THE NINTH CIRCUIT ERRONEOUSLY HELD THAT A CORPORATION CAN BE HELD LIABLE FOR CONSPIRING WITH ITSELF, EXACERBATING CONFUSION AMONG THE LOWER COURTS. 5

A. A Corporation Cannot Be Convicted Of Conspiracy Based Entirely On The Acts Of Its Own Employees. 5

B. The Opinion Below Exacerbates Confusion In The Lower Courts Regarding Application Of The Intracorporate Conspiracy Doctrine. 10

II. THE NINTH CIRCUIT ERRONEOUSLY HELD THAT THE CONVICTION OF ONE CO-CONSPIRATOR CAN BE UPHELD DESPITE THE ACQUITTAL OF AN INDISPENSABLE PARTY TO THE CONSPIRACY, EXACERBATING A SPLIT AMONG THE CIRCUITS. 17

CONCLUSION 23

TABLE OF AUTHORITIES

Cases — Page

Apodaca v. United States,
188 F.2d 932 (10th Cir. 1951) 20
Ashland Oil, Inc. v. Arnett,
875 F.2d 1271 (7th Cir. 1989) 15
Baker v. Stuart Broadcasting Co.,
505 F.2d 181 (8th Cir. 1974) 13
Bellamy v. Mason's Stores, Inc.,
508 F.2d 504 (4th Cir. 1974) 13
Buschi v. Kirven,
775 F.2d 1240 (4th Cir. 1985) 13
C.I.R. v. Acker,
361 U.S. 87 (1959) 16
Callan v. State Chemical Mfg. Co.,
584 F. Supp. 619 (E.D. Pa. 1984) 16
Central Bank of Denver, N.A. v. First Interstate Bank, N.A., 114 S. Ct. 1439 (1994) . . 5, 9
Chambers Dev. Co. v. Browning-Ferris Indus.,
590 F. Supp. 1528 (W.D. Pa. 1984) 15
City of Los Angeles v. Heller,
475 U.S. 796 (1986) *(per curiam)* 17
Cohen v. United States,
157 F 651 (2d Cir.), *cert. denied*,
207 U.S. 596 (1907) 10
Copperweld Corp. v. Independence Tube Corp.,
467 U.S. 752 (1984) 9, 12
Cortis v. Kenney,
995 F.2d 838 (8th Cir. 1993) 21
Crandon v. United States,
494 U.S. 152 (1990) 16
Cross v. General Motors Corp.,
721 F.2d 1152 (8th Cir. 1983),
cert. denied, 466 U.S. 980 (1984) 13

Dartmouth College v. Woodward,
17 U.S. (4 Wheat.) 518 (1819) 7
Day v. General Electric Credit Corp.,
546 A.2d 315 (Conn. App. 1988) 8
Doherty v. American Motors Corp.,
728 F.2d 334 (6th Cir. 1984) 13
Dombrowski v. Dowling,
459 F.2d 190 (7th Cir. 1972) 13
Dunn v. United States,
284 U.S. 390 (1932) 18-20
Evans v. United States,
112 S. Ct. 1881 (1992) 6
Farnsworth v. Zerbst,
98 F.2d 541 (5th Cir. 1938) 19
FCC v. American Broadcasting Co.,
347 U.S. 284 (1954) 16
Feder v. United States
257 F. 694 (2d Cir. 1919) 18,19
Fogerty v. Fantasy, Inc.,
114 S. Ct. 1023 (1994) 13
Girard v. 94th Street & Fifth Ave. Corp.,
530 F.2d 66 (2d Cir.), *cert. denied*,
425 U.S. 974 (1976) 13
Government of the Virgin Islands v. Hoheb,
777 F.2d 138 (3d Cir. 1985) 21
Great American Federal Savings &
Loan Ass'n v. Novotny,
442 U.S. 366 (1979) 14
Greenville Publishing Co. v. Daily Reflector, Inc.,
496 F.2d 391 (4th Cir. 1974) 9
H.J. Inc. v. Northwestern Bell Tel. Co.,
492 U.S. 229 (1989) 16
Haroco, Inc. v. American Nat'l Bank & Trust Co.,
747 F.2d 384 (7th Cir. 1984), *aff'd on*
other grounds, 473 U.S. 606 (1985) 15
Harris v. Rivera,
454 U.S. 339 (1981) *(per curiam)* 19

Hartzel v. United States,
322 U.S. 680 (1944) 19, 21
Harvey v. Fearless Farris Wholesale, Inc.,
589 F.2d 451 (9th Cir. 1979) 12
Herrmann v. Moore,
576 F.2d 453 (2d Cir.), *cert. denied*,
439 U.S. 1003 (1978) 8, 13
Hull v. Cuyahoga Valley Joint Vocational School Dist,
926 F.2d 505 (6th Cir.), *cert. denied sub nom.*
Hull v. Shuck, 111 S. Ct. 2917 (1991) 8, 13,14
Iannelli v. United States,
420 U.S. 770 (1975) 18
Jaglieski v. Package Machine Co.,
489 F. Supp. 232 (E.D. Pa. 1980) 8
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213 F. 926 (8th Cir. 1914), *aff'd*,
236 U.S. 531 (1915) 9
Krulewitch v. United States,
336 U.S. 440 (1949) 5, 18
Landmark Savings & Loan v. Loeb Rhoades,
Hornblower & Co.,
527 F. Supp. 206 (E.D. Mich. 1981) 15
Lawaetz v. Bank of Nova Scotia,
653 F. Supp. 1278 (D.V.I. 1987) 15
Marsh v. Vauhan,
78 Eng. Rep. 937 (Q.B. 1599) 18
Mauriber v. Shearson/American Express, Inc.,
567 F. Supp. 1231 (S.D.N.Y. 1983) 16
McLendon v. Continental Group, Inc.,
602 F. Supp. 1492 (D.N.J. 1985) 15
Medallion TV Enters. v. SelecTV of California,
627 F. Supp. 1290 (C.D. Cal. 1986),
aff'd, 833 F.2d 1360 (9th Cir. 1987),
cert. denied, 492 U.S. 917 (1989) 15
Merkel Assocs. v. Bellofram Corp.,
437 F. Supp. 612 (W.D.N.Y. 1977) 8

Mifflin v. Commonwealth,
5 Watts & S. (Pa.) 461 (1843) 16
Miller v. United States,
277 F. 721 (4th Cir. 1921) 19
Molzof v. United States,
112 S. Ct. 711 (1992) 7
Morissette v. United States,
342 U.S. 246 (1952) 6, 22
Morrison v. California,
291 U.S. 82 (1934) 19
Nelson Radio & Supply Co. v. Motorola, Inc.,
200 F.2d 911 (5th Cir. 1952), *cert. denied*,
345 U.S. 925 (1953) 8, 12
Nobile v. United States,
284 F. 253 (3d Cir. 1922) 13
Novotny v. Great American Federal Savings & Loan Ass'n,
584 F.2d 1235 (3d Cir. 1978) (*en banc*), *vacated on other grounds*, 442 U.S. 366 (1979) 14
Palmer v. Nationwide Mut. Life Ins. Co.,
945 F.2d 1371 (6th Cir. 1991) 15
Pandick, Inc. v. Rooney,
632 F. Supp. 1430 (N.D. Ill. 1986) 15
R. v. Grimes,
87 Eng. Rep. 142 (K.B. 1688) 18
Rosenthal v. United States,
45 F.2d 1000 (8th Cir. 1930) 19
Runs After v. United States,
766 F.2d 347 (8th Cir. 1985) 13
Rutherfoord v. Presbyterian-University Hosp.,
612 A.2d 500 (Pa. Super. 1992) 7
Saine v. A.I.A., Inc.,
582 F. Supp. 1299 (D. Colo. 1984) 16
Stathos v. Bowden,
728 F.2d 15 (1st Cir. 1984) 14
Steckler v. United States,
7 F.2d 59 (2d Cir. 1925) 20

Tanner v. United States,
483 U.S. 107 (1987) 6
Travis v. Gary Community Mental Health Center, Inc.,
921 F.2d 108 (7th Cir. 1990), *cert. denied*,
112 S. Ct. 60 (1991) 13
United States v. American Grain & Related Indus.,
763 F.2d 312 (8th Cir. 1985) 11
United States v. Ames Sintering Co.,
927 F.2d 232 (6th Cir. 1990) *(per curiam)* 10
United States v. Andrews,
850 F.2d 1557 (11th Cir. 1988)
(en banc), *cert. denied*,
488 U.S. 1032 (1989) 18, 20
United States v. Austin-Bagley Corp.,
31 F.2d 229 (2d Cir.), *cert.*
denied, 279 U.S. 863 (1929) 20
United States v. Bass,
404 U.S. 336 (1971) 12
United States v. Boling,
884 F.2d 924 (6th Cir. 1989), *cert. denied*,
493 U.S. 1082 (1990) 21, 22
United States v. Bosch-Morales,
677 F.2d 1 (1st Cir. 1982) 20
United States v. Bucuvalas,
909 F.2d 593 (1st Cir. 1990) 20
United States v. Carroll,
144 F. Supp. 939 (S.D.N.Y. 1956) 18
United States v. Computer Sciences Corp.,
689 F.2d 1181 (4th Cir. 1982), *cert. denied*,
459 U.S. 1105 (1983) 8, 15
United States v. Dakins,
872 F.2d 1061 (D.C. Cir.), *cert. denied*,
493 U.S. 966 (1989) 21
United States v. Dege,
364 U.S. 51 (1960) 8, 9
United States v. Duz-Mor Diagnostic Lab., Inc.,
650 F.2d 223 (9th Cir. 1981) 20

United States v. Fox,
130 F.2d 56 (3d Cir.), *cert. denied*,
317 U.S. 666 (1942) 19
United States v. Garcia,
882 F.2d 699 (2d Cir.), *cert. denied*,
493 U.S. 943 (1989) 21
United States v. Hartley,
678 F.2d 961 (11th Cir. 1982),
cert. denied, 459 U.S. 1170 (1983) 11, 16
United States v. Howard,
966 F.2d 1362 (10th Cir. 1992) 21
United States v. Hugh Chalmers Chevrolet-Toyota, Inc.,
800 F.2d 737 (8th Cir. 1986) 11
United States v. Lubin,
313 F.2d 419 (9th Cir. 1963) 20
United States v. Mahar,
801 F.2d 1477 (6th Cir. 1986) 11
United States v. Mancari,
875 F.2d 103 (7th Cir. 1989) 21
United States v. Notarantonio,
758 F.2d 777 (1st Cir. 1985) 11
United States v. Peters,
732 F.2d 1004 (1st Cir. 1984) 11, 17
United States v. Powell,
469 U.S. 57 (1984) 19-22
United States v. S & Vee Cartage Co.,
704 F.2d 914 (6th Cir.), *cert. denied*,
464 U.S. 935 (1983) 10, 11
United States v. Sachs,
801 F.2d 839 (6th Cir. 1986) 22
United States v. Sasser,
974 F.2d 1544 (10th Cir. 1992),
cert. denied, 113 S. Ct. 1063 (1993) 21
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310 U.S. 150 (1940) 19
United States v. Stevens,
909 F.2d 431 (11th Cir. 1990) 10-12, 17

United States v. Suntar Roofing, Inc.,
897 F.2d 469 (10th Cir. 1990) 21
United States v. Thomas,
900 F.2d 37 (4th Cir. 1990) 20
United States v. Thompson/Center Arms Co.,
112 S. Ct. 2102 (1992) 16
United States v. Valles-Valencia,
823 F.2d 381 (9th Cir. 1987) 20
United States v. Velasquez,
885 F.2d 1076 (3d Cir. 1989), *cert. denied*,
494 U.S. 1017 (1990) 21
United States v. Williams,
341 U.S. 70 (1951) 19
United States v. Williams,
503 F.2d 50 (6th Cir. 1974) 20
United States v. Wiltberger,
18 U.S. (5 Wheat.) 76 (1820) 12
United States v. Zuniga-Salinas,
952 F.2d 876 (5th Cir. 1992) 20
Wilhite v. H.E. Butt Co.,
812 S.W.2d 1 (Tex. App. 1991) 8
Worthington v. United States,
64 F.2d 936 (7th Cir. 1933) 19
Yancoski v. E.F. Hutton & Co.,
581 F. Supp. 88 (E.D. Pa. 1983) 15
Zombro v. Baltimore City Police Dep't,
868 F.2d 1364 (4th Cir.), *cert. denied*,
493 U.S. 850 (1989) 13

Statutes

15 U.S.C. § 1 . . . . . 12, 14
18 U.S.C. § 1001 2
18 U.S.C. § 1961 *et seq.* 14
18 U.S.C. § 1962(c) 14
18 U.S.C. § 1962(d) 14
18 U.S.C. § 241 14

18 U.S.C. § 3622 4
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28 U.S.C. § 1254(1) 2
42 U.S.C. § 1985 . . . . . 13, 14

Miscellaneous

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Developments in the Law—Conspiracy,
72 Harv. L. Rev. 920 20
Fletcher, Cyclopedia of the
Law of Private Corporations 7, 9
15A C.J.S. Conspiracy (1967) 7
Hawkins, Pleas of the Crown (6th ed. 1788) 8
Hawley & McGregor, Criminal Law,
(3d ed. 1899) 19
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§ 6.4 at 60-61 (1986) 6
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Sayre, Criminal Conspiracy, 35 Harv. L.
Rev. 393 (1922) 7
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of Private Corporations (2d ed. 1910) 8,10
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Wright, The Law of Criminal Conspiracies
and Agreements (1873) 6

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PETITION FOR WRIT OF CERTIORARI

Hughes Aircraft Company, Inc., respectfully petitions for a writ of *certiorari* to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit affirming Hughes' conviction of conspiracy under 18 U.S.C. § 371.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 20 F.3d 974 (1994) and is reprinted at Appendix ("App.") 1a -12a.

The District Court's unreported order denying Hughes' Motion For Judgment Of Acquittal Or New Trial is reprinted at App. 14a-28a.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 28, 1994. Hughes filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied on May 13, 1994. App. 13a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISION

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States.

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Petitioner Hughes Aircraft Co., Inc., contracted with the United States Government to deliver weapons systems containing "hybrids," sophisticated microelectronic components. The contract required, among other things, that Hughes conduct environmental screening tests on each hybrid. These tests were carried out at a Hughes division in California where one Donald LaRue worked as a line foreman.

In January 1992 the Government indicted both LaRue and Hughes on (1) two counts of making false statements to the United States in violation of 18 U.S.C. § 1001, and (2) one count of conspiring to defraud and to make false statements to the United States in violation of the general federal conspiracy

statute, 18 U.S.C. § 371.[1] The Government charged that LaRue had conspired with four other Hughes employees—two immediate supervisors, Jim Temple and Frank Saia, and two immediate subordinates, Margaret Goodearl and Marion Tolby—either to conduct certain environmental screening tests improperly or to skip them altogether.[2] There was no allegation that the conspiracy had extended beyond these employees, or that any of them had acted for private personal gain.[3]

After Hughes unsuccessfully moved to dismiss the conspiracy count on the ground that a corporation could neither conspire with its own employees nor be held liable for a conspiracy entirely among them, Hughes and LaRue were tried jointly in June 1992. The jury acquitted LaRue on all counts, and acquitted Hughes on the false-statement counts. Inexplicably, however, the jury convicted Hughes on the conspiracy count.

The District Court (Byrne, J., C.D. Cal.) denied Hughes' motion for judgment of acquittal or new trial. App. 14a - 28a. Although the court described the jury's conspiracy verdicts as "stark[ly] inconsisten[t]," *id.* 28a, it held that controlling Ninth Circuit precedent precluded all challenges based on verdict inconsistency. *Id.* 25a - 26a (citing *United States v. Valles-Valencia*, 823 F.2d 381, 382 (9th Cir. 1987)). Applying the

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[1] The indictment also included a number of additional counts later severed from those at issue here. Trial of these other counts awaits final resolution of this case.

[2] There is absolutely *no* evidence, however, that these alleged testing improprieties concealed or contributed to any performance failure in a product delivered to the United States Government. Indeed, notwithstanding its six-year investigation of Hughes, the Government to this day has taken no action to recall any product manufactured or tested by the company during the period covered by the indictment.

[3] The jury instructions specified that Hughes could be found guilty of conspiracy only if the jury found that LaRue had conspired with one or more of the four unindicted alleged co-conspirators, all Hughes employees. *See infra* n.9.

then-prevailing alternative fines provisions of the criminal code, 18 U.S.C. §§ 3622 and 3623, the Court subsequently sentenced Hughes to a fine of $3.5 million.

Hughes appealed. To hold a corporation vicariously liable for a conspiracy entirely among its own employees, Hughes argued, would be to hold it liable for conspiring with itself. That result would defy not only logic but the text of § 371 and the well-established "intracorporate conspiracy" doctrine that formed part of the legal background against which the statute was enacted. And even if the intracorporate conspiracy doctrine did not apply, Hughes' conspiracy conviction still could not be sustained in light of the jury's acquittal of an indispensable party to the alleged conspiracy.

The Ninth Circuit, however, affirmed Hughes' conviction and sentence. App. 1a - 12a. The court derided the corporation's construction of § 371 as "creative," *id.* 7a, "implausible," *id.*, and "illogical," *id.* 9a—*not* because it conflicted with the provision's text or history, but because, in the court's view, that construction "would undermine the *purpose* of the statute," *id.* (emphasis added), and conflict with "public policy," *id.* 8a. And the acquittal of an indispensable party to the conspiracy did not doom Hughes' conspiracy conviction, the court held, because of the general rule that verdict inconsistency is no ground for reversal. *Id.* 3a - 7a.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT ERRONEOUSLY HELD THAT A CORPORATION CAN BE HELD LIABLE FOR CONSPIRING WITH ITSELF, EXACERBATING CONFUSION AMONG THE LOWER COURTS.

A. A Corporation Cannot Be Convicted Of Conspiracy Based Entirely On The Acts Of Its Own Employees.

This case involves elementary principles of statutory construction. Courts are not free to interpret statutes—and particularly not criminal statutes—to accord with their own "public policy" views. *See, e.g., Central Bank of Denver, N.A. v. First Interstate Bank, N.A.*, 114 S. Ct. 1439, 1453-54 (1994). While discerning a statute's meaning is by no means a mechanical or invariably straightforward task, the opinion below does not even go through the motions of careful analysis. By casually relying on statutory "purpose" and "public policy," the Ninth Circuit significantly eroded the frail limits constraining the voracious conspiracy crime. As Justice Jackson warned years ago, "the looseness and pliability of the [conspiracy] doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case." *Krulewitch v. United States*, 336 U.S. 440, 449 (1949) (concurring opinion). The opinion below ignored not only textual and historical limitations on conspiracy, but also Justice Jackson's wise advice.

The statute at issue here, 18 U.S.C. § 371, is the general conspiracy provision in the federal criminal code. Its text reveals the absurdity of holding a corporation vicariously liable for a conspiracy entirely among its own employees. Section 371 provides that if "two or more persons conspire . . . each" shall be fined or imprisoned. Obviously, the "two or more persons" necessary for a conspiracy must be *separate* entities,

because "each" cannot be punished if they are the same. A single corporation cannot simultaneously stand in the shoes of *all* parties to a conspiracy—as a matter of logic and language, it cannot be "two or more persons" and "each" of those persons at once.

But it would be a mistake to view this case as involving no more than the application of rules of grammar or usage, for § 371 is hardly a newcomer to the United States Code. The statute "is the descendant of and bears a strong resemblance to conspiracy laws that have been in the federal statute books since 1867." *Tanner v. United States*, 483 U.S. 107, 128 (1987).[4] And the crime of conspiracy was a familiar part of the Anglo-American legal landscape long before then, having emerged in English law in the early 14th century. *See generally* R. Wright, The Law of Criminal Conspiracies and Agreements (1873); 2 W. LaFave & A. Scott, Substantive Criminal Law § 6.4 at 60-61 (1986).

The established common-law definition of conspiracy, of course, provides important guidance to the statute's meaning. As this Court has long emphasized, when Congress codifies a common-law concept "in which [is] accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette v. United States*, 342 U.S. 246, 263 (1952); *see also Evans v. United States*, 112

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[4] The Act of March 2, 1867, 14 Stat. 484, provided as follows:

> [I]f two or more persons conspire either to commit any offence against the laws of the United States, or to defraud the United States in any manner whatever, and one or more of said parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to impriso[n]ment not exceeding two years.

S. Ct. 1881, 1885 (1992); *Molzof v. United States*, 112 S. Ct. 711, 716 (1992). That interpretive approach represents a practical recognition that Congress does not write on a blank slate, and presumably does not intend to reinvent Anglo-American jurisprudence from scratch each and every time it legislates.

Although precise formulation of the crime of conspiracy has varied over the years, its essence has remained the same—an agreement between two or more persons to achieve an unlawful objective. *See generally* Sayre, Criminal Conspiracy, 35 Harv. L. Rev. 393 (1922). The element of plurality lies at the heart of the crime—"[a] conspiracy must be by two persons at least: one cannot be convicted of it, unless he have been indicted for conspiring with persons to the jurors unknown." 3 F. Wharton, Criminal Law § 2339 at 87 (6th ed. 1868).

When applied to natural persons, the plurality requirement is unproblematic; "[t]he impossibility of one person forming a combination with himself is too obvious for discussion." R. Perkins, Criminal Law 537 (1957). But the law has long defined "persons" to include artificial entities made up of *multiple* natural persons. The corporation is one such entity; for centuries, a corporation and its managers have been "considered as one person in law." 1 W. Blackstone, Commentaries *468 (1765); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819); 10 W. Fletcher, Cyclopedia of the Law of Private Corporations § 4884 at 361 (Zajdel ed. 1986).

At common law, the rule was (and remains) that artificial persons, like natural persons, cannot conspire with themselves. *See, e.g.*, 3 F. Wharton, Criminal Law § 2343 at 88 (6th ed. 1868).[5] A corporation, thus, can neither conspire

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[5] *See also* 15A C.J.S. Conspiracy § 37 at 731 (1967); *Rutherfoord v. Presbyterian-University Hosp.*, 612 A.2d 500, 508 (Pa. Super. 1992); (continued...)

with its own employees nor be held liable for a conspiracy entirely among them. This "familiar doctrine," *Herrmann v. Moore*, 576 F.2d 453, 459 (2d Cir.), *cert. denied*, 439 U.S. 1003 (1978) has long been applied to define the scope of conspiracies proscribed by a variety of federal statutes. *See, e.g., Hull v. Cuyahoga Valley Joint Vocational School Dist.*, 926 F.2d 505, 509 (6th Cir.), *cert. denied*, 111 S. Ct. 2917 (1991) (civil rights conspiracy); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190-91 & n.15 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983) (RICO conspiracy); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953) (antitrust conspiracy); *Jaglieski v. Package Machine Co.*, 489 F. Supp. 232, 233-34 (E.D. Pa. 1980) (common-law conspiracy in product liability case).

Indeed, this Court looked to the common law to decide the analogous question whether spouses could be convicted of conspiring together. *United States v. Dege*, 364 U.S. 51 (1960). Early common law held that a husband and wife could not make up the plurality necessary for a conspiracy, because marriage had united them into a single legal unit. *See, e.g.*, 1 Hawkins, Pleas of the Crown 351 (6th ed. 1788). The *Dege* Court, however, held that this rule had been "swept away . . . long *before* the originating conspiracy Act of 1867 was passed." 364 U.S. at 54 (emphasis added). Because, in the Court's view, the spousal conspiracy doctrine was an anachronism by the time the federal conspiracy statute was first enacted, Congress could not be deemed to have intended to incorporate the doctrine into the statute. "[W]e cannot infuse into the conspiracy statute a *fictitious attribution* to Congress of regard for the medieval

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[5] (...continued)
Wilhite v. H.E. Butt Co., 812 S.W.2d 1, 5 (Tex. App. 1991); *Day v. General Electric Credit Corp.*, 546 A.2d 315, 318-19 (Conn. App. 1988); *Merkel Assocs. v. Bellofram Corp.*, 437 F. Supp. 612, 618 (W.D.N.Y. 1977) (New York law).

notion of woman's submissiveness to the benevolent coercive powers of a husband in order to relieve her of her obligation of to obedience to [the law]." *Id.* at 54-55 (emphasis added). Chief Justice Warren, in dissent, agreed with the Court that the relevant inquiry in construing § 371 was the state of conspiracy jurisprudence in 1867, but strongly contested the Court's description thereof. *Id.* at 55-58.

The Ninth Circuit, as noted above, decided this case not on the basis of statutory text or history, but rather on considerations of "public policy" and statutory "purpose." It would be silly, that court declared, to construe the statute to "'*shield* a corporation or its agents from criminal liability where its agents acted on its behalf.'" App. 8a (quoting *United States v. Peters*, 732 F.2d 1004, 1008 n.7 (1st Cir. 1984) (emphasis in original)). "If we applied the intracorporate conspiracy doctrine to this case, *no* corporation acting on its own behalf by and through its employees could be found guilty of conspiracy." *Id.* 8a - 9a (emphasis added).

Putting aside the obvious impropriety of construing a criminal statute on policy grounds, *cf. Central Bank of Denver*, 114 S. Ct. at 1453-55, those policy arguments are flawed. The intracorporate conspiracy doctrine is far narrower than the Ninth Circuit supposed. It does not challenge the established rule that a corporation can be held vicariously liable for civil or criminal conspiracy—as long as that conspiracy is not limited entirely to its own agents or employees, but involves some other independent entity. *See, e.g., Joplin Mercantile Co. v. United States*, 213 F. 926, 936 (8th Cir. 1914), *aff'd*, 236 U.S. 531 (1915). A corporation might even be found guilty of conspiring with one or more of its own agents or employees where the latter acted not on the corporation's behalf, but for their own ends. *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 & n.15 (1984); *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974); 10 W. Fletcher, Cyclopedia of the Law of Private Corporations § 4884 at 369 (1993). And of course the corporation's

employees can *themselves* be convicted of conspiracy. *See*, e.g., *Cohen v. United States*, 157 F. 651, 653-54 (2d Cir.), *cert. denied*, 207 U.S. 596 (1907); 5 S. Thompson, Commentaries on the Law of Private Corporations § 5632 at 465 (2d ed. 1910). Contrary to the Ninth Circuit's assertion, thus, the intracorporate conspiracy doctrine does not "shield" corporations from the law of conspiracy. It simply recognizes that the liability of the conspirators cannot invariably be *extended* to the corporation—a corporation cannot, as a matter of law, simultaneously stand in the shoes of all parties to a conspiracy.

B. The Opinion Below Exacerbates Confusion In The Lower Courts Regarding Application Of The Intracorporate Conspiracy Doctrine.

The opinion below exacerbates the considerable confusion and inconsistency in the lower courts about the status of the intracorporate conspiracy doctrine in federal law. As the United States Code contains some 300 separate conspiracy provisions, that confusion cuts broadly across statutory lines. And the disarray is as deep as it is broad, showing no signs of abating without this Court's intervention.

The opinion below adds the Ninth Circuit to two others (the Sixth and Eleventh) that, at least in *dicta*, have stated that corporations *can* be convicted of conspiracy under 18 U.S.C. § 371 based entirely on the acts of their own employees. *See United States v. Ames Sintering Co.*, 927 F.2d 232, 236 (6th Cir. 1990) *(per curiam)*; *United States v. Stevens*, 909 F.2d 431, 432 (11th Cir. 1990) *(dictum)*; *United States v. S & Vee Cartage Co.*, 704 F.2d 914, 920 (6th Cir.), *cert. denied*, 464

U.S. 935 (1983); *United States v. Hartley*, 678 F.2d 961, 970-72 (11th Cir. 1982) *(dictum)*, *cert. denied*, 459 U.S. 1170 (1983).[6]

After first adopting that position, *see United States v. Peters*, 732 F.2d 1004, 1008 (1st Cir. 1984), the First Circuit has since rejected it. In *United States v. Notarantonio*, 758 F.2d 777, 789-90 (1st Cir. 1985), that court, relying on antitrust conspiracy precedents, applied the intracorporate conspiracy limitation to § 371. Because a "corporation cannot conspire with its own employees," the court explained, the corporate conspiracy conviction in that case was proper *only* because one of the other conspirators was an independent party. 758 F.2d at 790.

The Ninth Circuit recognized that by refusing to construe § 371 in light of the traditional intracorporate conspiracy doctrine, its interpretation of the statute conflicted with cases construing *other* conspiracy provisions in federal law. The court, however, attempted to distinguish these cases by asserting that: (1) the antitrust conspiracy cases are based on unique policies, *see* App. 8a; *see also Stevens*, 909 F.2d at 432-33; *S & Vee Cartage*, 704 F.2d at 920; *Hartley*, 678 F.2d at 970-71; and (2) other cases involve civil, not criminal, conspiracy, *see* App. 8a - 9a; *see also Mahar*, 801 F.2d at 1488 & n.19; *American Grain*, 763 F.2d at 320; *Peters*, 732 F.2d at 1008 & n.7; *S & Vee Cartage*, 704 F.2d at 920; *Hartley*, 678 F.2d at 971-72. The simple assertion of these distinctions, of

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[6] The Sixth and Eighth Circuits, similarly, have refused to apply the intracorporate conspiracy doctrine when construing other criminal conspiracy provisions in the U.S. Code. *See, e.g., United States v. Hugh Chalmers Chevrolet-Toyota, Inc.*, 800 F.2d 737, 738 (8th Cir. 1986) (construing Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 1986); *United States v. American Grain & Related Indus.*, 763 F.2d 312, 320 (8th Cir. 1985) (construing Commodity Credit Corporation Charter Act, 15 U.S.C. § 714m(d)); *United States v. Mahar*, 801 F.2d 1477, 1488 & n.19 (6th Cir. 1986) (construing Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 846).

course, does not make them correct or meaningful. They are neither.

With respect to the first asserted distinction, it is well-established that § 1 of the Sherman Act, 15 U.S.C. § 1, which prohibits conspiracies in restraint of trade, does not reach entirely intracorporate agreements. *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752; *Nelson Radio*, 200 F.2d at 914. Although that result can be, and has been, justified in part by reference to antitrust policies, its traditional justification is the more fundamental principle that the employees of a single firm do not provide the plurality of actors necessary for a conspiracy. "It is *basic in the law of conspiracy* that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation." *Nelson Radio*, 200 F.2d at 914 (emphasis added); *see also Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 455 (9th Cir. 1979). It puts the cart before the horse, thus, to contend that the intracorporate conspiracy doctrine "first arose" in "the antitrust context." *Stevens*, 909 F.2d at 432.

The second attempted distinction—between civil and criminal cases—is even more contrived. As an initial matter, the notion that criminal conspiracy provisions should be read *more broadly* than their civil counterparts is wildly counterintuitive. The rule of lenity, firmly-rooted in Anglo-American law, teaches that criminal statutes are, if anything, to be construed more, not less, strictly than their civil analogues. *See, e.g., United States v. Bass*, 404 U.S. 336, 348 (1971); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820) (Marshall, C.J.). Courts surely turn that rule on its head when they refuse to apply the intracorporate conspiracy doctrine in criminal cases precisely *because* they are criminal cases. As a corollary to the rule of lenity, furthermore, the common law traditionally held that the scope of a corporation's vicarious liability should be *narrower*

in the criminal than in the civil context. *See, e.g., Nobile v. United States*, 284 F. 253, 255 (3d Cir. 1922).

At any rate, the purported civil/criminal distinction has less than firm support in the caselaw. The Courts of Appeals, for example, are split on whether corporations can be held liable for purely intracorporate conspiracies in civil actions brought under one of the Nation's oldest civil-rights laws, the Ku Klux Klan Act of 1871, 42 U.S.C. § 1985. The Seventh Circuit, in an opinion by then-Judge Stevens, held in 1972 that they cannot. *See Dombrowski v. Dowling*, 459 F.2d 190, 196. *Dombrowski* has since been followed by five other circuits.[7] These cases do not turn on considerations unique to § 1985—which, in relevant part, tracks the conspiracy language of § 371—but on general conspiracy principles, and particularly on the bedrock principle that a corporation cannot conspire with itself. If a conspiracy provision in a broadly remedial *civil rights* statute implicitly excludes intracorporate conspiracies, then it follows *a fortiori* that a materially identical conspiracy provision in a *criminal* statute must too. *Cf. Fogerty v. Fantasy, Inc.*, 114 S. Ct. 1023, 1027-32 (1994); *see also id.* at 1034-35 (opinion concurring in judgment).

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[7] *See Hull v. Cuyahoga Valley Joint Vocational School Dist.*, 926 F.2d 505, 509 (6th Cir.), *cert. denied*, 111 S. Ct. 2917 (1983); *Travis v. Gary Community Mental Health Center, Inc.*, 921 F.2d 108, 109 (7th Cir. 1990), *cert. denied*, 112 S. Ct. 60 (1991); *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364, 1371 (4th Cir.), *cert. denied*, 493 U.S. 850 (1989); *Buschi v. Kirven*, 775 F.2d 1240, 1251-53 (4th Cir. 1985); *Doherty v. American Motors Corp.*, 728 F.2d 334, 339-40 (6th Cir. 1984); *Cross v. General Motors Corp.*, 721 F.2d 1152, 1156-57 (8th Cir. 1983), *cert. denied*, 466 U.S. 980 (1984); *Herrmann v. Moore*, 576 F.2d 453, 459 (2d Cir.), *cert. denied*, 439 U.S. 1003 (1978); *Girard v. 94th Street & Fifth Ave. Corp.*, 530 F.2d 66, 70-71 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976); *Baker v. Stuart Broadcasting Co.*, 505 F.2d 181, 183 (8th Cir. 1974); *see also Runs After v. United States*, 766 F.2d 347, 354 (8th Cir. 1985); *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504, 508 (4th Cir. 1974) (opinion concurring in result).

The Third Circuit, however, has refused to interpret § 1985 in light of traditional intracorporate conspiracy principles, expressly disagreeing with the line of cases noted above. *Novotny v. Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235, 1256-59 (3d Cir. 1978) *(en banc)*, *vacated on other grounds*, 442 U.S. 366 (1979). And that disagreement has been echoed by the First Circuit, in an opinion by then-Judge Breyer. *Stathos v. Bowden*, 728 F.2d 15, 20 (1st Cir. 1984). This Court has expressly reserved the question. *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 n.11 (1979); *see also Hull v. Shuck*, 111 S. Ct. 2917 (1991) (White, J., dissenting from denial of *certiorari*) (noting split).

Relying on an alleged civil/criminal distinction to explain which conspiracy provisions in federal law should be deemed to include an implicit intracorporate conspiracy limitation, thus, is problematic as a matter of logic and precedent. And the distinction falls apart completely in light of those conspiracy provisions with *both* civil and criminal applications. Indeed, 42 U.S.C. § 1985, the civil-rights conspiracy statute discussed above, has a criminal-law twin, 18 U.S.C. § 241. And § 1 of the Sherman Act, of course, is both civil and criminal.

Yet another such dual-purpose conspiracy provision is found in the Rackeeter Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*[8] Not surprisingly, the lower courts are in complete disarray over whether RICO's conspiracy provision applies to purely intracorporate conspiracies. Most courts have declined to permit such liability in civil conspiracy cases—again, not on any ground unique to

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[8] RICO, in pertinent part, makes it unlawful for "any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). The statute also proscribes conspiracies to violate its substantive provisions. *Id.* § 1962(d).

RICO, but because of fundamental common-law conspiracy principles. "'A corporate conspiracy also requires more than the collective judgment of two individuals within the same entity, for their conduct, if challenged, becomes that of the single, corporate entity.'" *Lawaetz v. Bank of Nova Scotia*, 653 F. Supp. 1278, 1287 (D.V.I. 1987) (quoting *Jagielski v. Package Machine Co.*, 489 F. Supp. 232, 233 (E.D. Pa. 1980)); *see also Palmer v. Nationwide Mut. Life Ins. Co.*, 945 F.2d 1371, 1373, 1376 (6th Cir. 1991); *Medallion TV Enters. v. SelecTV of California*, 627 F. Supp. 1290, 1301 n.7 (C.D. Cal. 1986), *aff'd*, 833 F.2d 1360 (9th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989); *McLendon v. Continental Group, Inc.*, 602 F. Supp. 1492, 1510-12 (D.N.J. 1985); *Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1541-42 (W.D. Pa. 1984); *Yancoski v. E.F. Hutton & Co.*, 581 F. Supp. 88, 97 (E.D. Pa. 1983); *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. 206, 209 (E.D. Mich. 1981).

Several of these cases state in *dicta* that the opposite result would obtain in a criminal RICO conspiracy. *Lewaetz*, 653 F. Supp. at 1287 n.13; *McLendon*, 602 F. Supp. at 1511. Noting that RICO and Sherman Act conspiracies are "analogous," however, the Fourth Circuit has applied the intracorporate conspiracy doctrine even in a criminal RICO case. *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190-91 & n.15 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). "[W]e would not take seriously, in the absence, at least, of very explicit statutory language, an assertion that a defendant could conspire with his right arm, which held, aimed and fired the fatal weapon." *Id.* at 1190.

Other courts, in contrast, have refused to apply the intracorporate conspiracy doctrine to RICO, primarily on the (misguided) theory that the doctrine is limited to the antitrust context. *See, e.g., Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989); *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 403 & n.22 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985); *Pandick, Inc. v. Rooney*,

632 F. Supp. 1430, 1435 (N.D. Ill. 1986); *Callan v. State Chemical Mfg. Co.*, 584 F. Supp. 619, 623 (E.D. Pa. 1984); *Saine v. A.I.A., Inc.*, 582 F. Supp. 1299, 1307 n.9 (D. Colo. 1984); *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. 1231, 1241 (S.D.N.Y. 1983). And at least one Court of Appeals has refused to apply the intracorporate conspiracy doctrine to a *criminal* RICO conspiracy. *United States v. Hartley*, 678 F.2d at 986 & n.41.

The notion that a single statutory provision can bear multiple meanings is at best far-fetched, even if that provision has both civil and criminal applications. *See, e.g., United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2110 & n.10 (1992); *Crandon v. United States*, 494 U.S. 152, 168 (1990); *C.I.R. v. Acker*, 361 U.S. 87, 91 (1959); *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954). Indeed, Justice Scalia, joined by the Chief Justice, Justice O'Connor, and Justice Kennedy, has made precisely this point with respect to RICO. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (opinion concurring in judgment). Usually, of course, the point is made to narrow a statute's scope in the civil context because of its possible application in the criminal context. Here, however, the point only underscores the folly of purporting to interpret conspiracy provisions in federal law *more* broadly in criminal than in civil cases.

The question whether a corporation can be convicted of conspiring with its own employees is an important and recurring one in federal law. It has long percolated among the lower courts, generating ever greater confusion. The time is ripe for this Court to impose some order in this unruly corner of the law. As a prescient judge noted long ago, "[t]he law of conspiracy is certainly in a very unsettled state. The decisions have gone on no distinctive principle; nor are they always consistent." *Mifflin v. Commonwealth*, 5 Watts & S. (Pa.) 461 (1843) (Gibson, C.J.).

II. THE NINTH CIRCUIT ERRONEOUSLY HELD THAT THE CONVICTION OF ONE CO-CONSPIRATOR CAN BE UPHELD DESPITE THE ACQUITTAL OF AN INDISPENSABLE PARTY TO THE CONSPIRACY, EXACERBATING A SPLIT AMONG THE CIRCUITS.

The Ninth Circuit also erred by upholding Hughes' conspiracy conviction despite the same jury's acquittal of LaRue, an indispensable party to any such conspiracy. Relying on this Court's precedents rejecting challenges based on verdict inconsistency, the court below held that LaRue's acquittal did not preclude Hughes' conviction because "the conviction of one co-conspirator is valid even when all the other co-conspirators are acquitted." App. 5a - 6a.[9] That conclusion exacerbates a split among the Courts of Appeals on the need for verdict consistency in conspiracy cases.[10]

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[9] There can be no question that the jury's verdicts convicting Hughes of conspiracy while acquitting LaRue were, as the District Court put it, "stark[ly] inconsisten[t]." App. 28a. This case involved an alleged "wheel" conspiracy with LaRue at its hub—he was a necessary party to any conspiracy. That is why, as the court explained, "[d]uring the trial, Hughes, the government and the Court agreed that Hughes could be guilty of conspiracy *only* if LaRue was found to have conspired with one of four unindicted Hughes employees." App. 14a (emphasis added). Accordingly, the jury was instructed that a conspiracy would have to consist of "LaRue, and at least one of the [four] unindicted co-conspirators, namely James Temple, Frank Saia, Margaret Goodearl and/or Marion Tolby." App. 31a. As the District Court noted, the Government presented no evidence that would sustain Hughes' conspiracy conviction on any other theory. App. 14a. *Cf. City of Los Angeles v. Heller*, 475 U.S. 796, 798 (1986) *(per curiam)* (jury verdicts may be upheld only on theories presented to jury, not speculative *post hoc* rationalizations).

[10] Because Hughes is a corporation, the issue of verdict consistency in this case merges with the issue of vicarious liability. An artificial entity like a corporation cannot *itself* enter into a conspiracy, *see, e.g., United States v. Stevens*, 909 F.2d at 433-34; *United States v. Peters*, 732 F.2d at 1008 n.6; *United States v. Carroll*, 144 F. Supp. 939, 942-43 (S.D.N.Y. 1956); its

(continued...)

It is certainly true that, as a general matter, verdict inconsistency is no ground for reversing a conviction. The Supreme Court set forth this rule as early as 1932, *Dunn v. United States*, 284 U.S. 390 (Holmes, J.), and reaffirmed it more than half a century later in *United States v. Powell*, 469 U.S. 57 (1984). But that rule has never been absolute.

To the contrary, it has long co-existed alongside another traditional doctrine—the "rule of consistency" in conspiracy law. A conspiracy inherently involves two or more people; this plurality requirement makes the crime virtually unique. *See, e.g., Feder v. United States*, 257 F. 694, 697 (2d Cir. 1919) (suggesting that reason for rule of consistency in conspiracy cases is "the indivisibility of the crime for which a plurality of defendants are tried"); *cf. Iannelli v. United States*, 420 U.S. 770, 773-86 (1975); *Krulewitch v. United States*, 336 U.S. 440, 443-58 (1949) (Jackson, J., concurring); *United States v. Andrews*, 850 F.2d 1557, 1570-71 (11th Cir. 1988) *(en banc)* (Clark, J., dissenting), *cert. denied*, 488 U.S. 1032 (1989). From well before the time the federal conspiracy statute was passed—indeed, from well before the American colonies were settled or proclaimed their independence, *see, e.g., Marsh v. Vauhan*, 78 Eng. Rep. 937 (Q.B. 1599); *R. v. Grimes*, 87 Eng. Rep. 142 (K.B. 1688)—the established rule in Anglo-American common law was that a person could not be convicted of conspiracy if all alleged co-conspirators were acquitted. *See, e.g.*, 3 F. Wharton, Criminal Law § 2339 at 87 (6th ed. 1868)

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[10] (...continued)
participation is inherently vicarious. Thus, as the District Court recognized, *see supra* n.9, and explained to the jury, App. 30a - 31a, Hughes itself could not conspire with LaRue or any other individual; the corporation could be held liable for conspiracy, if at all, only because of the acts of its agents or employees. The acquittal of LaRue is flatly inconsistent with the notion that any of the four other potential co-conspirators could have conspired, and that inconsistency necessarily infects the same jury's conspiracy verdict against the corporation. Vicarious liability obviously cannot, as a matter of law or logic, exceed the underlying liability on which it is based.

("in an indictment for conspiracy against two, the acquittal of one is the acquittal of the other"); *see also* J. Hawley & M. McGregor, Criminal Law 103 (3d ed. 1899); 2 J. Bishop, Criminal Law § 188 at 130 (9th ed. 1923).

This Court's decisions in *Dunn* and *Powell* in no way purported to overturn the traditional rule of consistency in conspiracy law. Neither case, in fact, provided any opportunity to do so—both involved challenges to a jury's inconsistent verdicts on multiple counts against a *single defendant*. Indeed, this Court recognized and applied the rule of consistency in a number of cases after *Dunn*. *Hartzel v. United States*, 322 U.S. 680, 682 n.3 (1944) (plurality opinion), for example, held that it was legally "impossible" to sustain a conspiracy conviction upon the acquittal of all alleged co-conspirators. *See also Morrison v. California*, 291 U.S. 82, 93 (1934) (conspiracy legally "impossible" where sole alleged co-conspirator acquitted); *United States v. Williams*, 341 U.S. 70, 86 (1951) (Black, J., concurring) (conspiracy conviction must be reversed when necessary co-conspirators acquitted); *cf. Harris v. Rivera*, 454 U.S. 339, 345 & n.13 (1981) *(per curiam)* (contrasting general rule that "[i]nconsistency in a verdict is not a sufficient reason for setting it aside" with *Hartzel*'s application of rule of consistency in cases involving acquittal of all alleged co-conspirators but one); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 246 (1940) *(dictum)* (where conspiracy conviction "necessarily dependent" on the participation of an acquitted party, conviction cannot stand).

Both before and after *Dunn*, moreover, the Courts of Appeals routinely acknowledged the rule of consistency in conspiracy cases. *See, e.g., Feder v. United States*, 257 F. 694, 696-97 (2d Cir. 1919); *Miller v. United States*, 277 F. 721, 726 (4th Cir. 1921); *Rosenthal v. United States*, 45 F.2d 1000, 1003 (8th Cir. 1930); *Worthington v. United States*, 64 F.2d 936, 939 (7th Cir. 1933); *Farnsworth v. Zerbst*, 98 F.2d 541, 544 (5th Cir. 1938); *United States v. Fox*, 130 F.2d 56, 57 (3d Cir.), *cert. denied*, 317 U.S. 666 (1942); *Apodaca v. United States*,

188 F.2d 932, 940 (10th Cir. 1951); *United States v. Lubin*, 313 F.2d 419, 423 (9th Cir. 1963); *United States v. Williams*, 503 F.2d 50, 54 (6th Cir. 1974); *United States v. Bosch-Morales*, 677 F.2d 1, 3 (1st Cir. 1982) (per panel including Breyer, J.) To the limited extent these courts even considered the relationship between the rule of consistency in conspiracy cases and *Dunn*, they deemed the former a "limited" but "well-recognized" exception to the latter. *United States v. Duz-Mor Diagnostic Lab., Inc.*, 650 F.2d 223, 226 n.3 (9th Cir. 1981); *Bosch-Morales*, 677 F.2d at 3; *Apodaca*, 188 F.2d at 940.[11] Indeed, academic commentary routinely analyzed the rule of consistency in conspiracy cases without noting or suggesting any tension with *Dunn*'s general inconsistent-verdicts rule. *See, e.g.*, Developments in the Law—Conspiracy, 72 Harv. L. Rev. 920, 972-74 (1959).

Although this Court's opinion in *Powell* neither involved nor purported to call into question the rule of consistency, many Courts of Appeals interpreted it as the rule's death knell. In *Powell*'s wake, five Circuits (the First, Fourth, Fifth, Ninth and Eleventh) overruled earlier precedents applying the longstanding common-law rule. *See United States v. Zuniga-Salinas*, 952 F.2d 876 (5th Cir. 1992) *(en banc)*; *United States v. Bucuvalas*, 909 F.2d 593, 595-97 (1st Cir. 1990); *United States v. Thomas*, 900 F.2d 37, 40 (4th Cir. 1990); *United States v. Andrews*, 850 F.2d 1557, 1561-62 (11th Cir. 1988) *(en banc)*, *cert. denied*, 488 U.S. 1032 (1989); *United States v. Valles-Valencia*, 823 F.2d 381, 382 (9th Cir. 1987). These courts simply imported *Powell*'s general tolerance of inconsistent verdicts into the law

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[11] Indeed, *Dunn*'s analysis consisted largely of a quotation from a Second Circuit opinion, *Steckler v. United States*, 7 F.2d 59, 60 (1925), *see* 284 U.S. at 393—but the latter's author, Judge Learned Hand, apparently perceived no inconsistency between *Dunn*'s general rule and the narrower principle that "[i]f [a conspiracy] verdict had left only one defendant who could be guilty, undoubtedly it could not stand." *United States v. Austin-Bagley Corp.*, 31 F.2d 229, 233 (2d Cir.) (L. Hand, J.), *cert. denied*, 279 U.S. 863 (1929) (citing *Feder v. United States*, 257 F. 694 (2d Cir. 1919)).

of conspiracy, without regard for the latter's unique context and history.

Another five Circuits (the Second, Third, Seventh, Eighth, and District of Columbia) have not expressly abrogated the rule of consistency in light of *Powell*, but have hinted at an inclination to do so. *United States v. Garcia*, 882 F.2d 699, 704-05 (2d Cir.), *cert. denied*, 493 U.S. 943 (1989); *United States v. Velasquez*, 885 F.2d 1076, 1091 n.13 (3d Cir. 1989), *cert. denied*, 494 U.S. 1017 (1990); *Government of the Virgin Islands v. Hoheb*, 777 F.2d 138, 142 n.6 (3d Cir. 1985); *see also id.* at 142-43 (Garth, J., concurring); *United States v. Mancari*, 875 F.2d 103, 104-05 (7th Cir. 1989); *Cortis v. Kenney*, 995 F.2d 838, 840-41 & n.2 (8th Cir. 1993); *United States v. Dakins*, 872 F.2d 1061, 1065 (D.C. Cir.), *cert. denied*, 493 U.S. 966 (1989).

In the Tenth Circuit, however, the rule of consistency appears to have survived *Powell*. In *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 475 & n.3 (10th Cir. 1990), the court challenged the proposition that *Powell* had abolished the rule, noting that *Powell* did "not discuss *Hartzel* or expressly overturn the traditionally recognized exception." The *Suntar Roofing* court, however, had no occasion to resolve the issue definitively, as not all alleged co-conspirators in the case had been acquitted. In two subsequent cases the court again noted, but had no occasion to resolve, the issue. *United States v. Sasser*, 974 F.2d 1544, 1561 & n.8 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1063 (1993); *United States v. Howard*, 966 F.2d 1362, 1363-64 & n.2 (10th Cir. 1992).

The Sixth Circuit also recognizes the continued vitality of the traditional rule of consistency after *Powell*. In *United States v. Boling*, 884 F.2d 924 (6th Cir. 1989), *cert. denied*, 493 U.S. 1082 (1990), the court reaffirmed "[t]he controlling circuit principle . . . that '[w]here all other alleged coconspirators are acquitted, the conviction of one person for conspiracy will not be upheld,'" *id.* at 925 (quoting *United States v. Williams*, 503 F.2d 50, 54 (6th Cir. 1974)). Relying

on *United States v. Sachs*, 801 F.2d 839, 845 (6th Cir. 1986), another post-*Powell* case, the court simply held that the rule did not apply where an indispensable co-conspirator was not actually acquitted, but simply dismissed or retried. In no way did either *Boling* or *Sachs* so much as hint that this Court's opinion in *Powell* had altered longstanding circuit law.

Thus, in the short decade since *Powell*, the lower courts have veered from virtually unanimous acceptance of the centuries-old rule of consistency toward its virtually complete annihilation. It cannot seriously be doubted that the rule formed part of the common-law background against which 18 U.S.C. § 371 was enacted. Congress, therefore, presumably understood and ratified it. *Morissette v. United States*, 342 U.S. 246, 263 (1952). Yet in the mad dash to proclaim the rule's demise, not a single court of appeals has paused to ponder its pedigree, or its longstanding peaceful coexistence with the general rule condoning verdict inconsistency. This Court should now resolve the uncertainty in the lower courts and clarify whether *Powell* truly sought to abolish the rule of consistency. Such a hoary tenet of the common law does not deserve the shabby treatment it has been accorded over the past decade--and, at the very least, courts should not add insult to injury by treating inconsistent verdicts inconsistently.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

JOHN J. HIGGINS
HUGHES AIRCRAFT
COMPANY, INC.
7200 Hughes Terrace
P.O. Box 80028
Los Angeles, CA 90090

KENNETH W. STARR
Counsel of Record
CHRISTOPHER LANDAU
KIRKLAND & ELLIS
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-5000

JOSEPH E. PAPELIAN
GENERAL MOTORS CORP.
3031 West Grand Boulevard
P.O. Box 33122
Detroit, Michigan 48232

Attorneys for Petitioner

Dated: August 11, 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-50681
D.C. No. CR-91-1022-WMB

United States Of America,
Plaintiff-Appellee,
v.
Hughes Aircraft Co., Inc.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
WILLIAM MATTHEW BYRNE, JR.,
DISTRICT JUDGE, PRESIDING

Argued and Submitted December 6, 1993
Decided March 28, 1994
Amended April 28, 1994

Before: TANG, D.W. NELSON, and LEAVY, Circuit Judges

PER CURIAM

Per Curiam:

Hughes Aircraft Co., Inc. ("Hughes") appeals from its conviction and sentence for conspiring to defraud and make false statements to the federal government. We affirm.

FACTS AND PRIOR PROCEEDINGS

Hughes contracted with the United States to manufacture microelectronic circuits, known as "hybrids," which are used as components in weapons defense systems. The contracts required Hughes to perform a series of tests on each hybrid. As the hybrids made their way through the testing process, they were accompanied by paperwork indicating what tests had been performed, the results of those tests, and the identity of the operator of the testing equipment.

Hughes's former employee, Donald LaRue ("LaRue"), was a supervisor responsible for ensuring the accuracy of the hybrid testing process. LaRue arranged for the paperwork to indicate falsely that all tests had been performed and that each hybrid had passed each test. When LaRue's subordinates called his actions to the attention of LaRue's supervisors, the supervisors did nothing about it. Instead, they responded that LaRue's decisions were his own and were not to be questioned by his subordinates.

Hughes and LaRue were charged with one count of conspiracy to defraud and make false statements to the United States in violation of 18 U.S.C. § 371,[1] and two counts of making false statements in furtherance of that conspiracy in violation of 18 U.S.C. § 1001.[2] LaRue was acquitted on all

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[1] "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." 18 U.S.C. § 371.

[2] "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or

(continued...)

counts. Hughes was convicted of the conspiracy charge, but acquitted of the other two charges.[3] Hughes appeals from both its conviction and fine of $3.5 million.

ANALYSIS

I. CONVICTION

A. Standard of Review

Hughes raises several arguments in support of the contention that its conviction under § 371 must be overturned as a matter of law. Because these arguments present pure questions of law, we review them de novo. *See Anderson v. United States*, 966 F.2d 487, 489 (9th Cir. 1992).

B. Discussion

1. Inconsistent Verdicts

Hughes first argues that it must be acquitted as a matter of law because the same jury that convicted Hughes acquitted its "indispensable co-conspirator," LaRue, of the identical charges on identical evidence. Hughes bases its argument on three Supreme Court cases from the 1930's and 1940's,[4]

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[2] (...continued)
covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both." 18 U.S.C. § 1001.

[3] Hughes was charged with 50 additional counts of false statements to the United States. These counts were severed and await resolution of this appeal.

[4] Those three cases do not support Hughes's contention because none dealt with inconsistent jury verdicts. In *Hartzel v. United States*, 322 U.S. 680 (1944), the trial court set aside the conviction of two of three co-conspirators. The Court concluded "the setting aside of [the two co-conspirators'] convictions makes it impossible to sustain petitioner's conviction upon the basis of . . . the conspiracy count." *Id.* at 682 n.3. In *Morrison v. California*, 291 U.S. 82 (1934), the Court found that the evidence was insufficient to
(continued...)

arguing that they provide an exception to the general rule that inconsistency of jury verdicts is not a ground for reversal. *See Dunn v. United States*, 284 U.S. 390, 393 (1932); *United States v. Powell*, 469 U.S. 57, 64-65 (1984). According to Hughes, the post-*Dunn* Supreme Court cases indicate that the inconsistent verdict rule applies only to situations involving inconsistencies in multiple verdicts against a single defendant, not inconsistencies in multiple verdicts against multiple defendants. Controlling Ninth Circuit precedent precludes us from adopting such a rule.

In *United States v. Valles-Valencia*, 811 F.2d 1232 (9th Cir.), as amended by 823 F.2d 381 (1987), the defendant argued that, because his sole co-conspirator was acquitted, his own conviction for conspiracy was impossible as a matter of law. Initially we agreed and stated "the acquittal of all but one of the conspirators signifies that the jury found no agreement to act, and the remaining conspirator cannot have [conspired with himself] since '[c]onspiracy requires a plurality of actors. . . .'" 811 F.2d at 1239 (quoting *United States v. Wright*, 742 F.2d 1215, 1224 (9th Cir. 1984)). In response to the subsequent Supreme Court decision in *Powell*, however, we amended our ruling, stating that

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[4] (...continued)
support one of the co-conspirator's convictions. Thus, the Court noted "[i]t is impossible in the nature of things for a man to conspire with himself" and ruled "[t]he conviction failing as to the one defendant must fail as to the other." *Id.* at 92 & 93. Finally, in *Gebardi v. United States*, 287 U.S. 112 (1932), the Court ordered an acquittal of a woman convicted of conspiring with a man to violate the Mann Act (transporting a woman interstate for the purposes of prostitution) because the evidence was insufficient to support her conviction. The Court noted that under the Mann Act the woman's consent was not criminal. *Id.* at 123. Thus, her consent, without more, was insufficient evidence to convict her of conspiracy to violate the Mann Act. *Id.* The Court concluded "[a]s there was no proof that the man conspired with anyone else to bring about the transportation, the convictions of both petitioners must be [r]eversed." *Id.*

> [I]nconsistent verdicts can just as easily be the result of jury lenity as a determination of the facts. Thus, the acquittal of all conspirators but one does not necessarily indicate that the jury found no agreement to act. Moreover, the Court has rejected a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them. The fact that the conflict in this case involves charges against different defendants, rather than different charges against the same defendant does not affect the rationale.

823 F.2d at 381-82 (internal quotation and citation omitted).

The Supreme Court's decision in *Powell* supports this extension of the application of the *Dunn* rule insulating inconsistent jury verdicts from appellate review. "[T]he Government's inability to invoke review, the general reluctance to inquire into the workings of the jury, and the possible exercise of lenity—suggests that the best course to take is simply to insulate jury verdicts from review on [inconsistency] ground." *Powell*, 469 U.S. at 68-69. Contrary to Hughes's contentions, this Circuit has not recognized a post-*Powell* exception to the *Dunn* rule.[5] Accordingly, the conviction of one

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[5] To support this contention, Hughes cites *United States v. Hart*, 963 F.2d 1278 (9th Cir. 1992); *United States v. Guzman*, 849 F.2d 447 (9th Cir. 1988); and *United States v. Marchini*, 797 F.2d 759 (9th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987). Because each of these cases dealt with inconsistent verdicts against single defendants, they are inapplicable to Hughes's contention that we have recognized an exception to *Dunn* for inconsistent verdicts against multiple defendants. Moreover, each of these three cases holds that inconsistent verdicts can stand, even in the presence of a conviction that is rationally incompatible with an acquittal, provided sufficient evidence exists to support a verdict of guilt. *See Hart*, 963 F.2d at

(continued...)

co-conspirator is valid even when all the other co-conspirators are acquitted.

2. Respondeat Superior

Hughes next argues that it is entitled to a judgment of acquittal because the evidence against it and LaRue was identical, yet one was convicted while the other was acquitted.[6] This argument is predicated on the assumption that LaRue was the sole employee for whose actions Hughes could be found vicariously guilty and that the evidence against each of the two defendants was necessarily identical. However, some of the evidence of conspiracy was offered against Hughes alone. Moreover, as this evidence indicates, the jury could have found Hughes guilty based on the actions or omissions of its

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[5] (...continued)
1281; *Guzman*, 849 F.2d at 448; *Marchini*, 797 F.2d at 765. Hughes does not challenge the sufficiency of the evidence.

[6] This argument is simply a variation of the inconsistent jury verdicts contention set out in part 1, *supra*.

Hughes cites to *United States v. Duz-Mor Diagnostic Labs, Inc.*, 650 F.2d 223 (9th Cir. 1981), as support for this argument. In *Duz-Mor* the trial court granted a motion to dismiss the indictment against the only employee whose actions could have led to corporate vicarious liability, but denied the corporate employer's motion to dismiss. *Id.* at 225. On appeal we noted two exceptions to the general rule that inconsistencies in jury verdicts rendered in the same proceeding do not require reversal.

The first exception involves "the inconsistent conviction of a conspirator whose alleged co-conspirators have been acquitted." *Id.* However, this exception to *Dunn* was overruled in *Powell*, 469 U.S. at 64-65 ("[W]here truly inconsistent verdicts have been reached, '[t]he most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt'" (quoting *Dunn*, 284 U.S. at 393)). The second exception, which applies to "inconsistent multiple convictions, where the defendant could be guilty of either, but not both, charged offenses[,]" *id.* at 226 n.3, is clearly irrelevant to the facts of the instant appeal.

Moreover, *Duz-Mor* involved a bench trial, to which the *Powell* rationale does not apply.

supervisors and employees other than LaRue. As Hughes's assumption that the facts against both defendants were identical is erroneous, and no other facts support its argument, we reject this contention.

3. Statutory Construction

Hughes's third argument is that the plain language of 18 U.S.C. § 371, which states that if "two or more persons conspire . . . each" may be punished, prevents its conviction because it is legally impossible for a party to conspire with itself. Hughes argues that, because it is vicariously liable for each of its employees, a conspiracy between employees would necessitate a finding that Hughes conspired with itself. We reject this creative construction. The statutory language does not exclude criminal liability for a corporation simply because its employees are the actual conspirators. To rule otherwise would effectively insulate all corporations from liability for conspiracies involving only employees acting on behalf of that corporation. We hold that a corporate may be liable under § 371 for conspiracies entered into by its agents and employees. *See United States v. Peters*, 732 F.2d 1004, 1008 (1st Cir. 1984).

Nonetheless, Hughes argues that the statute is ambiguous and that the rule of lenity compels a reversal of its conviction. *See United States v. LeCoe*, 936 F.2d 398, 402 (9th Cir. 1991). However, the Supreme Court recently explained that "[t]his maxim of statutory construction . . . cannot dictate an implausible interpretation of a statute, nor one at odds with the generally accepted contemporary meaning of a term." *Taylor v. United States*, 495 U.S. 575, 596 (1990). Moreover, the rule of lenity is not "'to be used in complete disregard of the purpose of the legislature.'" *Perrin v. United States*, 444 U.S. 37, 49 n.13 (1979) (quoting *United States v. Culbert*, 435 U.S. 371, 379 (1978)). Because the interpretation offered by Hughes is implausible and would undermine the purpose of the statute, we reject it.

4. The Intracorporate Conspiracy Doctrine In Antitrust Law

Hughes also contends that we should extend the reach of the intracorporate conspiracy doctrine in antitrust law, which holds that a conspiracy requires "an agreement among two or more persons or distinct business entities." *Calculators Hawaii, Inc. v. Brandt Inc.*, 724 F.2d 1332, 1336 (9th Cir. 1983). *See also Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *Harvey v. Fearless Farris Wholesale Inc.*, 589 F.2d 451, 455 (9th Cir. 1979). While this doctrine has been extended by some circuits to civil rights cases, *see e.g. Buschi v. Kirven*, 775 F.2d 1240, 1251 (4th Cir. 1985); *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972), other circuits have declined to do so, *see e.g. Dussouy v. Gulf Coast Invest. Corp.*, 660 F.2d 594, 603 (5th Cir. 1981), and we have reserved the issue. *See Portman v. County of Santa Clara*, 995 F.2d 898, 910 (9th Cir. 1993) (listing cases).

However, this doctrine has never been applied to criminal cases. As the First Circuit noted, "There is a world of difference between invoking the fiction of corporate personality to *subject* a corporation to civil liability for acts of its agents and invoking it to *shield* a corporation or its agents from criminal liability where its agents acted on its behalf." *Peters*, 732 F.2d at 1008 n.7. Every other circuit to address the issue has come to the same conclusion. *See United States v. Ames Sintering Co.*, 927 F.2d 232, 236 (6th Cir. 1990); *United States v. Stevens*, 909 F.2d 431, 432 (11th Cir. 1990); *United States v. Hughes Chalmers Chevrolet-Toyota, Inc.*, 800 F.2d 737, 738 (8th Cir. 1986); *Dussouy*, 660 F.2d at 603.

Hughes argues that public policy requires us to apply the intracorporate conspiracy doctrine to criminal cases. However, a stronger public policy mandates a contrary result. Simply because no other corporation or individual is involved, or there is no joining of previously divergent goals, does not mean there is no conspiracy. If we applied the intracorporate conspiracy doctrine to this case, no corporation acting on its own behalf by

and through its employees could be found guilty of conspiracy. This result is illogical.

We decline to extend the intracorporate conspiracy doctrine to criminal activity.

5. Wharton's Rule

Wharton's Rule prevents a conspiracy conviction when an underlying substantive offense requires more than one actor, such as adultery or dueling, and in which "the immediate consequences of the crime rest on the parties themselves rather than on society." *Iannelli v. United States*, 420 U.S. 770, 782-83 (1975). Here we have a conspiracy to defraud the government, a violation of 18 U.S.C. § 1001.

Hughes argues that a corporation could only violate 18 U.S.C. § 1001 through the efforts of at least two of its employees due to the supervisory and reporting structure of a corporation. Of course, that is not true: a corporation could be liable under § 1001 for false statements to the government by just one of its employees. A conspiracy arises when more than one of its employees agree to defraud the government.

Moreover, the consequences of government fraud certainly do not rest on the parties themselves rather than society. Government fraud has an adverse effect on the government treasury, the quality of government projects, and in cases such as this one, the safety of individuals utilizing the government goods purchased.

This argument is rejected.

Because we find no merit to any of Hughes's arguments on this point, we affirm the conviction.

II. SENTENCING

A. Standard Of Review

We review *de novo* the legality of a sentence, *United States v. Heim*, 15 F.3d 830, 831 (9th Cir. Jan. 24, 1994), while we examine the district court's factual determinations

underlying that sentence for clear error. *United States v. Mainard*, 5 F.3d 404, 405 (9th Cir. 1993).

B. Discussion

1. Findings Under Federal Rule of Criminal Procedure 32

Hughes first contends that, because there was a dispute regarding the amount of the fine to be imposed, the district court was required to make written findings under Federal Rule of Criminal Procedure 32(c)(3)(D). The Rule provides that when a defendant "allege[s] any factual inaccuracy in the presentence investigation report . . . the court shall, as to each matter controverted, either make (i) a finding as to the allegation or (ii) . . . [state that] the matter controverted will not be taken into account in sentencing." Fed. R. Crim. P. 32(c)(3)(D).

Here, the dispute did not concern any factual matter in the presentence report, but rather a contention made by the government in its sentencing memorandum. Thus, no written factual findings were required, and Rule 32(c)(3)(D) does not apply. *See United States v. Rachels*, 820 F.2d 325, 327 (9th Cir. 1987). Moreover, Hughes failed to object to the fact that the presentence report did not address the loss to the government and has thus waived any claim that the presentence report was not properly completed.

2. Calculation Of Fine

Hughes also contends that the district court improperly calculated the amount of its fine in several ways. The alternative fines provision permits a sentencing court to fine a defendant "not more than the greater of twice the gross gain or twice the gross loss" caused by the crime. Former 18 U.S.C. § 3623(c)(1).[7] This section does not require specific findings of

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[7] "If the defendant derives pecuniary gain from the offense, or if the offense results in pecuniary loss to another person, the defendant may be fined not

(continued...)

the exact loss. Thus, the only question before us is whether the district court made sufficient findings on the record that the loss to the government was at least one half of $3.5 million, or $1.75 million.

In its sentencing memorandum, the government acknowledged that the exact amount of its losses in this case would be impossible to calculate. However, it offered two alternative bases for calculating its pecuniary loss, which provided the court with an adequate foundation for its $3.5 million assessment. The district court made the following finding:

> The other factor in the fine is how much can you precisely calculate? How precise must you be? . . . I think the test can probably be by a preponderance of the evidence. How do you calculate the loss? While the government has made a good faith effort to present some data along with declarations of memorandums from various people, it is hard to be precise and I think the government concedes that is difficult for them to be precise on what its loss is. I think there was some loss. I can't be any more precise to the exact loss than can the government in its presentation.

[SER 151.] Under the government's calculations, which Hughes has not shown are incorrect, the court could have fined Hughes anywhere from $17.6 million to $984 million. Although the district court's findings were vague, they were sufficiently supported to uphold the fine imposed.

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[7] (...continued)
more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process." 18 U.S.C. § 3623(c)(1) (repealed).

Hughes also argues that the district court erroneously based the fine on the cost of this prosecution. Hughes bases its claim on the district court's comments:

> Again, I guess one of the factors that might be considered in appropriateness of the fine is how much money it cost the government to bring this action. I don't have that figure, but I know it is in the millions to bring this action, but that cannot be the sole basis of the fine.

[SER 158.] The last phrase clarifies that the district court did not in fact *base* the fine on the costs of prosecution, and it is unnecessary to address Hughes's arguments that it lacked notice of or the opportunity to dispute the prosecution costs in violation of its due process rights, and that this burdened its right to plead not guilty.

Hughes finally argues that the government is not a "person" under 18 U.S.C. § 3623 because "person" is defined under 1 U.S.C. § 1 as including only "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." However, this statutory definition of "person" is not an exhaustive list: Section 1 provides simply that "person" *includes* the above. We hold that the government is a "person" under 18 U.S.C. § 3623.

The sentence imposed by the district court was not an abuse of discretion.

CONCLUSION

The conviction and sentence are AFFIRMED.

APPENDIX B

[Filed May 13, 1994]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-50681
D.C. No. CR-91-1022-WMB

United States Of America,
Plaintiff-Appellee,
v.
Hughes Aircraft Co., Inc.,
Defendant-Appellant.

ORDER

Before: TANG, D.W. NELSON, and LEAVY, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges D.W. Nelson and Leavy have voted to reject the suggestions for rehearing en banc, and Judge Tang has so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C

[Filed September 8, 1992]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Criminal No. 91-1022 WMB

United States Of America,
Plaintiff,

v.

Hughes Aircraft Co., Inc. and Donald Anthony LaRue,
Defendants.

ORDER DENYING MOTION FOR
JUDGMENT OF ACQUITTAL OR NEW TRIAL

I. Background.

Defendant Hughes Aircraft Co., Inc. ("Hughes") and defendant Donald LaRue, a former Hughes employee, were charged with conspiracy to defraud the United States in violation of 18 U.S.C. §§ 371 and 1001. During the trial, Hughes, the government and the Court agreed that Hughes could be guilty of conspiracy only if LaRue was found to have conspired with one of four unindicted Hughes employees. 14 Trans. p. 69, lines 14-25 (6/9/92). The jury was so instructed. Court's Instructions to the Jury, p. 11 lines 10-13. Despite these instructions and a paucity of evidence at trial supporting any other theory of Hughes' culpability, the jury acquitted LaRue and convicted Hughes. Before the Court is

Hughes' motion for judgment of acquittal under F.R.Crim.P. 29(c), and, in the alternative, for a new trial under F.R.Crim.P. 33.

Acknowledging the impropriety of speculation about or inquiry into the jury's reasoning, *United States v. Powell*, 469 U.S. 57, 66-67, 105 S.Ct. 471 (1984), Hughes offers three bases for its motion. First, Hughes argues in the wake of LaRue's acquittal that the vicarious nature of Hughes' criminal liability distinguishes this case from the line of authority insulating inconsistency in criminal verdicts from judicial review. Second, defendant argues that in the Ninth Circuit and on the facts of this case, the so-called "rule of consistency" (requiring acquittal of an alleged conspirator in a joint conspiracy trial where the other defendants have been acquitted) survives that same line of authority. Third, defendant argues that without regard to LaRue's acquittal, the evidence supporting Hughes' conviction is legally insufficient. Alternatively, defendant moves for a new trial.

II. The Motion For Judgment Of Acquittal.

A. *United States v. Powell* and the *Dunn* Rule.

In *Dunn v. United States*, 52 S.Ct. 189 (1932), the Supreme Court held that a criminal defendant convicted by a jury on one count could not attack that conviction simply because it was inconsistent with the jury's verdict on another count.[1] The Court stated that "[c]onsistency in the verdict is not necessary," relying in part on a now inapplicable argument that had the counts been presented in separate indictments, an acquittal on one would not have had *res judicata* effect as to another. The Court also quoted *Steckler v. United States*, 7 F.2d 59, 60 (2nd Cir. 1925), as follows:

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[1] In *Dunn* the defendant had been convicted of maintaining a common nuisance by keeping intoxicating liquor for sale at a specified place, but had been acquitted of unlawful possession and unlawful sale of such liquor.

> The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more that their assumption of a power which they had not the right to exercise, but to which they were disposed through lenity.

52 S.Ct. at 190.

The Dunn rule was later invoked by the Supreme Court in the context of corporate criminal liability. In *United States v. Dotterweich*, 64 S.Ct. 134 (1943), Dotterweich was found guilty of shipping misbranded drugs in interstate commerce and of shipping an adulterated drug, but the corporation of which he was president and general manager was not convicted. Dotterweich argued that having failed to find the corporation guilty, the jury could not find him guilty. Citing *Dunn*, the Court held as follows:

> [w]hether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries.

65 S.Ct. at 135.

The *Dunn* rule was reinforced more recently in *United States v. Powell*, 105 S.Ct. 471 (1984). Powell had been convicted of three compound offenses of using the telephone in "committing and in causing and facilitating" certain felonies, but she had been acquitted of two counts—conspiracy to possess cocaine with intent to distribute, and possession of cocaine with intent to distribute—proof of which was an element of the telephone facilitation counts. On appeal, the Ninth Circuit held

that an exception to *Dunn* obtains where the defendant is convicted under 21 U.S.C. § 843(b) (telephone facilitation) but acquitted of the underlying felony. 719 F.2d 1480 (9th Cir. 1983). The Supreme Court reversed, reaffirming the *Dunn* rule and taking issue with a number of circuit decisions which had carved out exceptions to it. 105 S.Ct. at 476. The Court stated that "the *Dunn* rule rests on a sound rationale that is independent of its theories of res judicata...." 105 S.Ct. at 476. Noting that the Double Jeopardy Clause prevents the government from appealing an inconsistent acquittal, the Court further stated:

> [i]nconsistent verdicts ... present a situation where "error," in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored. Given this uncertainty, and the fact the Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course. *Harris v. Rivera*[2] ... indicates that nothing in the Constitution would require such a protection, and we therefore address the problem only under our supervisory powers over the federal criminal process. For us, the possibility that the inconsistent verdicts may favor the criminal defendant as well as the Government militates against review of such convictions at the defendant's behest.

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[2] In *Harris v. Rivera*, 102 S.Ct. 460 (1981), the Supreme Court held that a defendant could not obtain relief by writ of habeas corpus on the basis of inconsistent verdicts rendered after a state bench trial. The Court confirmed "the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons." 102 S.Ct. at 464.

Id. at 477 (footnote added). The Court further remarked that "[t]he fact that inconsistency may be the result of lenity, coupled with the Government's inability to invoke review, suggests that inconsistent verdicts should not be reviewable." *Id.* (Footnote omitted).

The Supreme Court in *Powell* confirmed the applicability of the *Dunn* rule even where the jury ignores the Court's explicit instructions. Rejecting Powell's argument that the inconsistent verdict necessitated a finding of insufficient evidence, the Court noted that whether approached on a sufficiency of the evidence theory or on a collateral estoppel type theory, the problem remains "that the same jury reached inconsistent results...."[3] The Court added:

> [t]his problem is not altered when the trial judge instructs the jury that it must find the defendant guilty of the predicate offense to convict on the compound offense. Although such an instruction might indicate that the counts are no longer independent, if inconsistent verdicts are nevertheless reached those verdicts still are likely to be the result of mistake, or lenity, and therefore are subject to the *Dunn* rationale.

Id. at 478-79.

Powell appears to countenance no exceptions to the *Dunn* rule. After pointing to the protection afforded criminal defendants by trial and appellate court review of the sufficiency of the evidence, the Court stated that "[w]e do not believe that further safeguards against jury irrationality are necessary." *Id.* at 478. Nothing that "[t]he rule established in *Dunn v. United States* has stood without exception in this Court for 53 years...,"

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[3] The *Powell* Court stated that in such a situation, "principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful." *Id.* at 478.

the *Powell* court concluded by stating that "[i]f it is to remain that way, and we think it should, the judgment of the Court of Appeals must be [reversed]." *Id.* at 479.

Hughes provides the Court no persuasive justification for taking this case outside *Powell*'s conclusion that "the best course to take is simply to insulate jury verdicts from review" on the ground that the jury reached inconsistent results. *See* 105 S.Ct. at 479.

B. Hughes' Argument Based On Inherent Limitations Of Corporate Criminal Liablity.

Hughes seeks to avoid *Powell* altogether by asking the Court to establish logical limits on the vicarious criminal liability of corporations. Hughes admits that it has found no cases circumscribing the attribution theory underlying corporate criminal liability in the context of an inconsistent verdict. The cases, according to Hughes, have instead focused on the sufficiency of evidence against a convicted corporation where individual agents were acquitted, finding that such inconsistency does not by itself render the evidence against the corporation insufficient. *See United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1008 (9th Cir. 1972) (despite employee's acquittal, evidence connecting employee with conspiracy to violate the Sherman Act could be considered as against employer corporation in testing the sufficiency of evidence supporting conviction of employer).

Hughes thus directs the Court to *City of Los Angeles v. Heller*, 106 S.Ct. 1571 (1986), which it argues offers support for the imposition of logical and legal limits on vicarious liability. *Heller* was a civil rights action brought under 42 U.S.C. § 1983 against the City of Los Angeles, individual members of the city's police commission, and two police officers. The plaintiff contended that the officers had arrested him without probable cause and had used excessive force. One of the officers prevailed on summary judgment. The court bifurcated the action, severing the claims brought under

Monell v. Dept. of Soc. Serv. of City of N.Y., 98 S.Ct. 2018 (1978), and trying the claims against the remaining police officer. The jury, which had not been instructed on any affirmative defenses such as qualified immunity, returned a verdict for the officer. The District Court subsequently dismissed the *Monell* claims on the grounds that exoneration of the officer precluded liability on the part of the city or the commissioners. The Ninth Circuit reversed the dismissal of the *Monell* claims on the grounds that the verdict did not necessarily negate the existence of a constitutional injury, but might instead have been based on a belief that the officer was entitled to a good faith defense. 106 S.Ct. at 1572.

The Supreme Court, in a per curiam opinion, agreed with the district court and reversed the Ninth Circuit holding. The Court noted the lack of any instruction on affirmative defenses and stated that juries must be assumed not to base their decisions on legal questions with respect to which they have not been charged. *Id.* at 1573. The Court observed that the city and the commissioners "were sued only because they were thought legally responsible for [the officers'] actions" and remarked that "if the latter inflicted no constitutional injury on respondent, it is inconceivable that [the city and police commissioners] could be liable to respondent." *Id.* The Court thus concluded that because it had been determined that the claimant suffered no constitutional injury, the claimant would not be able to establish the damages element of the *Monell* claims. *Id.*

Hughes suggests that *Heller* turns on the consequences of a vicarious liability theory, and that it should not be distinguished merely as a civil case not subject to the rule permitting inconsistent verdicts in criminal cases. Hughes goes so far as to suggest that the *Heller* majority must have considered and rejected an inconsistent verdict analysis because such an approach was explicitly taken up by Justice Stevens' dissent. *See id.* at 1576. The government argues persuasively that *Heller* is distinguishable as a civil case and further notes the

dissent's recognition that "[i]n a criminal case, a jury's apparently inconsistent verdict is allowed to stand...," but that "[i]n a civil case, the rule is less clear." *Id.*

Even putting the distinction between civil and criminal cases aside, *Heller* offers little support for Hughes' argument. Hughes attempts to draw an analogy between the vicarious liability assigned to a municipality in a civil rights action and the vicarious liability imputed to a corporation through its employee, arguing through *Heller* that the general tolerance of inconsistent verdicts in criminal cases should be restricted in vicarious liability situations. *Heller* did not, however, present a vicarious liability situation. Despite the Supreme Court's observation that the city and police commissions "were sued only because they were thought legally responsible for" the police officers' actions, 106 S.Ct. at 1573, municipal liability under *Monell* would not have been imputed to the city through its employment of the police officers. *Monell*, 98 S.Ct. at 2036-38. Rather, if found liable, the city would have been directly liable for damage caused by its own custom or policy. *Id.* The *Heller* Court based its holding on the plaintiff's failure to establish an element of the *Monell* cause of action (constitutional injury), and not on any circumscription of attributed liability. The *Monell* imputation truly analogous to corporate criminal liability is that which assigns a municipality liability for the actions of its policymakers. In *Heller*, of course, the claims against the police commissioners had been severed along with the claims against the city, and imputation of the commissioners' actions to the city had not yet been put in issue.

The government, in support of the viability of corporate criminal liability under the circumstances of this case, directs the Court to *United States v. Cargo Service Stations, Inc.*, 657 F.2d 676 (5th Cir. 1981). That case involved the prosecution of a number of corporations and individuals for a criminal conspiracy to fix prices in violation of the Sherman Act. Citing Supreme Court and Fifth Circuit authority for the permissibility of inconsistent verdicts, the Fifth Circuit rejected

the appellant corporations' argument that they were entitled to a judgment notwithstanding the verdict because "every person who could have acted as their agent has been acquitted of criminal wrongdoing." *Id.* at 685.

Hughes argues that *Cargo Services* is merely one more "inconsistent verdict" case and attempts to pierce the appellants' representation—unchallenged by the *Cargo Services* court—that every person who could have acted as their agent had been acquitted. Hughes points out that while five corporations appealed the verdict, only three individuals had been acquitted, suggesting that other possible agents must have been involved in the alleged conspiracy.[4] Toward the same end, Hughes points out that nineteen current or former employees of the indicted companies testified to price-fixing conduct. These arguments by Hughes amount to pure speculation. The *Cargo Services* court clearly accepted the appellants' representation at face value and felt the substantial authority supporting inconsistent verdicts in criminal cases to be sufficient to uphold a corporation's conviction in the face of its only agent's acquittal. The government takes precisely this position in the instant case.

Hughes provides no authority supporting its assertion that in light of LaRue's acquittal, Hughes' conviction "gives the corporate agent fiction a weight it simply cannot bear." *Braswell v. United States*, 487 U.S. 99, 128 (1988) (Kennedy, J., dissenting). In consequence, the Court sees no reason to distinguish inconsistent verdicts in the context of corporate criminal liability from inconsistent verdicts in other kinds of criminal cases.

---

[4] It is of course possible that an individual defendant acted as an agent for more than one of the corporate defendants. At least two of the five corporate appellants, Cargo Gasoline Company and Cargo Service Stations, Inc., appear to have been related. *See* 657 F.2d at 678.

B. Hughes' Argument For Application Of The "Rule Of Consistency."

Despite the encompassing reasoning of *Powell*, Hughes attempts to invoke the traditional rule rejecting conviction of an alleged conspirator where all his alleged coconspirators have been acquitted. *See Hartzel v. United States*, 64 S.Ct. 1233, 1234 n.3 (1944). Prior to *Powell*, the Ninth Circuit articulated and circumscribed this so-called "rule of consistency" in *United States v. Patterson*, 678 F.2d 774 (9th Cir. 1982), as follows:

> acquittal of all but one of the alleged conspirators requires acquittal of the remaining defendant. [Citation omitted.] However, if an indictment refers to unknown persons as coconspirators and the government supplies evidence to support a charge that the defendant conspired with the unknown persons, a conspiracy conviction will stand even if all other named defendants are acquitted.

678 F.2d at 781, citing *Lubin v. United States*, 313 F.2d 419, 423 (9th Cir. 1963). The government maintains that the "rule of consistency" was repudiated in *U.S. v. Valles-Valencia*, 823 F.2d 381 (9th Cir. 1987). Alternatively, the government argues, the evidence that unindicted Hughes employees participated in the conspiracy removes this case from the "rule of consistency." Hughes seizes on certain ambiguous language in *Valles-Valencia* to argue that on the narrow facts of this case, *Patterson's* "rule of consistency" survives and commands Hughes' acquittal. Hughes' position is without merit.

The Ninth Circuit's original opinion in *Valles-Valencia*, at 811 F.2d 1232 (9th Cir. 1987), applied the "rule of consistency" to vacate the conviction of one defendant where the other alleged conspirators had been acquitted of that charge (four by the Court and two by the jury.) The government successfully petitioned for rehearing. In its second opinion, the Ninth Circuit acknowledged that in *Powell* the Supreme Court

"has rejected 'a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them.'" *Id.*, quoting *Powell*, 105 S.Ct. at 478. The Ninth Circuit stated that the rationale of *Powell* applies not just to cases involving multiple charges against the same defendant, but also to those which, like the case presently before the Court, involve charges against different defendants. 823 F.2d at 382.

As the government suggests, *Valles-Valencia* is most reasonably read simply to repudiate the "rule of consistency" in favor of reliance solely on a review of the sufficiency of the evidence supporting conviction. Hughes nonetheless seizes on certain ambiguities emphasized in the following passage from the opinion to argue that a sliver of the doctrine remains effective:

> [w]e now reconsider the "rule of consistency" in light of the Supreme Court's recent holding in *Powell*. Because of the *Powell* decision, the broad language from *Lubin* to the effect that the acquittal of all but one of the alleged co-conspirators requires the acquittal of the remaining defendant can no longer be relied upon. *Each case must be examined carefully to see whether evidence of conspiring with others, known or unknown, was produced during the trial.* Our earlier cases relying on the broad language must be deemed overruled *in part* by the Supreme Court's decision in *Powell*.
>
> As the government points out in its petition for rehearing and suggestion for rehearing en banc, there was evidence that there were unindicted co-conspirators and *indicted co-conspirators who were acquitted. The jury verdicts indicated that the jury knew how to acquit those whose guilt was not proved beyond*

> *a reasonable doubt and knew how to convict those whose guilt was satisfactorily proven.*

Id. (Emphasis added.) Hughes argues that *Valles-Valencia* confirms the continuing validity of the Ninth Circuit's earlier holding in *Patterson, supra*, requiring the Court to carefully examine the record to see if there was sufficient proof of a conspiracy between the defendant and someone other than his acquitted co-defendant(s). Based on the *Valles-Valencia* court's statement that the jury "knew how to acquit" some and "knew how to convict" others, Hughes argues that the court took into account evidence against "indicted co-conspirators who were acquitted" by the court, but not evidence concerning the two who were acquitted by the jury. Specifically, Hughes argues that the second *Valles-Valencia* opinion amounts to a reversal of the panel's previous conclusion that the district court's judgment of acquittal in favor of certain defendants precluded the appellate court from consideration of evidence concerning those defendants in evaluating the sufficiency of evidence against the remaining alleged conspirator. Hughes accordingly argues that because LaRue was acquitted by a jury, this Court can sustain Hughes' conviction only if there was sufficient evidence of a conspiracy among Hughes agents other than LaRue.

Hughes' suggestion that the *Valles-Valencia* court would leave this purported distinction between judge-acquitted and jury-acquitted defendants either entirely implicit or, at best, referenced in the most oblique fashion, is untenable. Moreover, Hughes' proffered interpretation flies in the face of *Powell*, the encompassing nature of which was recently noted by the Ninth Circuit in *United States v. Hart*, 92 Daily Journal D.A.R. 6186 (9th Cir. 1992). A far more reasonable reading of *Valles-Valencia* is that it merely affirms the need to examine the sufficiency of the evidence that the convicted defendant was party to an illegal agreement. Cases relying on *Lubin* were overruled "in part" because those cases likely resolved issues unrelated to the "rule of consistency." The "rule of

consistency" no longer exists apart from a requirement that there be sufficient evidence of an agreement between the convicted party and some other person.

Hughes cannot win a judgment of acquittal though reliance on the "rule of consistency" as circumscribed by *Patterson*.

C. Hughes' Argument That The Evidence Against It Is Insufficient.

Hughes' final argument for judgment of acquittal is that the evidence adduced at trial was insufficient under F.R.Civ.[sic]P. 29. The test for review of the sufficiency of the evidence to support a criminal conviction is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 99 S.Ct. 2781, 2789 (1979) (emphasis original). Noting that this criterion "impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law...," *id.*, the *Jackson* Court observed that "[t]he question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached." *Id.* at n.13. Furthermore, the reviewing court is to respect the province of the jury to determine the credibility of witnesses, to resolve evidentiary conflicts, and to draw reasonable inferences from proven facts by assuming that the jury resolved all such matters in a manner supporting the verdict. *U.S. v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir. 1990).

Hughes itself acknowledges that "in assessing the sufficiency of the evidence against a convicted corporation, a reviewing court may affirmatively consider the conduct of an acquitted agent." Defendants' motion, p. 7 lines 17-21, citing *United States v. Hilton Hotels Corp.*, *supra*, 467 F.2d at 1008. In assessing the evidence against Hughes, LaRue's acquittal

must be disregarded, and evidence of his participation in the alleged conspiracy must be considered.

Because the evidence supporting Hughes' culpability as defined by the jury instructions surpassed the *Jackson v. Virginia* standard, Hughes may not be granted judgment of acquittal based on insufficiency of evidence.

D. Hughes' Motion In The Alternative For A New Trial.

Hughes makes its F.R.Civ.[sic]P. 33 motion for a new trial on the same bases as its Rule 29 motion for judgment of acquittal, but notes that the motion for new trial affords the Court greater latitude in reviewing the evidence. As explained by Wright:

> [o]n a motion for judgment of acquittal, the court is required to approach the evidence from a standpoint most favorable to the government, and to assume the truth of the evidence offered by the prosecution. If on this basis there is substantial evidence justifying an inference of guilt, the motion for acquittal must be denied.
>
> On a motion for new trial, however, the power of the court is much broader. It may weigh the evidence and consider the credibility of witnesses. If the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted.

Wright, Federal Practice and Procedure: Criminal 2d §553. The Ninth Circuit has stated that a motion for a new trial "should be granted 'only in exceptional cases in which the evidence preponderates heavily against the verdict.'" *United States v. Pimentel*, 654 F.2d 538, 545 (9th Cir. 1981), citing Wright at §553.

Because it cannot be said that the evidence "preponderates heavily" against Hughes' conviction, the motion for a new trial is denied.

III. Conclusion.

Under *Powell*, *supra*, the jury's verdict, despite its stark inconsistency, is simply beyond the review of this Court except as to the sufficiency of the evidence. The evidence supporting Hughes' conviction was not legally insufficient. For these reasons, Hughes' motion for judgment of acquittal, and its motion in the alternative for a new trial, are both DENIED.

DATED: SEP 8- 1992

/s/
Wm. Matthew Byrne, Jr.
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Criminal No. 91-1022 WMB

United States Of America,
Plaintiff,

v.

Hughes Aircraft Co., Inc. and Donald Anthony LaRue,
Defendants.

EXCERPT OF TRANSCRIPT OF PROCEEDINGS
JURY INSTRUCTIONS
JUNE 10, 1992

[18] THE COURT: Now turning, ladies and gentlemen, to the charges themselves. The indictment in this case arises under two sections of the United States Code, section 371 and 1001, and the relevant portions of those sections read as follows:

As to 371, which is the basis for the charge in Count 1: If two or more persons conspire either to commit an offense against the United States or to defraud the United States or any agency thereof in any manner or for the purpose—excuse me.

Counsel, it seems to me there is a typo there. It should be "for the"—

MR. NEWHOUSE: For any purpose, your Honor.

THE COURT: I think that's right. Let me read it to you again, ladies and gentlemen.

If two or more persons conspire either to commit an offense against the United States or defraud the United States or any agency thereof in any manner or for any purpose and one

or more such persons do an act to effect the object of the conspiracy, each shall be guilty of an offense against the United States.

Section 1001 reads: Whoever in any manner within [19] the jurisdiction of any department or agency of the United States knowingly and willfully makes any false or fraudulent statements or representations shall be guilty of an offense against the United States.

Defendant, Hughes Aircraft Company, Inc., is a corporation, and a corporation is a legal entity and it may be found guilty of a criminal offense.

A corporation, of course, cannot act for itself. It may act only through its employees who are authorized to act for the corporation. A corporation is legally responsible for those acts or omissions of its employees made or performed within the scope of their employment and with the intent to benefit the corporation.

To find a corporation defendant guilty, you must find beyond a reasonable doubt that all the essential elements of the offenses that are set forth in these instructions, which I'll give you in a moment, are present as to the corporation in the form of acts or omissions of its employees who were—excuse me—acts or omissions of its employees that were performed within the scope of their employment.

Whether the employees' acts or omissions were committed within the scope of their employment is a question of fact for you. To be acting within his employment, the employee must first have intended that this act would [20] produce some benefit to the corporation although that does not have to be his only intent.

Second, the employee must have been acting within his authority. An act within the employee's authority—an act was within the employee's authority if it was directly related to the performance of the type of duties that the employee had the

general authority to perform, judging from his position with the company, the responsibility previously entrusted to him and the circumstances surrounding his past conduct. The fact that an employee is not a high managerial official will not, by itself, relieve the corporation of responsibility of the employee's act.

In these instructions, I'm going to be using the terms "knowingly" and "willfully," and I'll define those terms for you now.

An act or failure to act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

An act is done willfully if done voluntarily and intentionally and with the specific intent to do something that the law forbids, that is to say, with bad purpose to either disobey or disregard the law.

Now, turning to Count 1 of the indictment, the defendants are charged in Count 1 of the indictment with conspiring to defraud the United States and to make false [21] statements to the United States in violation of the code sections I mentioned to you earlier. In order for the defendants to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, that beginning in or about the year of 1985 and ending in January of 1987, there was an agreement between two or more persons to commit at least one crime as charged in the indictment, with all of you agreeing as to which crime;

Second, that Defendant LaRue and Defendant Hughes, Hughes acting through LaRue, and at least one of the unindicted co-conspirators, namely, James Temple, Frank Saia, Margaret Goodearl and/or Marion Tolby, were members of the conspiracy knowing of at least one of its objects, the objects being to defraud the United States or to make false statements to the United States and intending to help accomplish it, with all

of you agreeing which object of the conspiracy the members intended to accomplish;

And, third, that the existence of the—that during the existence of the conspiracy, one of the members of the conspiracy performed at least one of the overt acts set forth in the indictment for the purpose of carrying out the conspiracy, with all of you agreeing on the particular overt act that you find was committed.

Supreme Court, U.S.
FILED
OCT 12 1994
OFFICE OF THE CLERK

No. 94-262

In the Supreme Court of the United States

OCTOBER TERM, 1994

HUGHES AIRCRAFT COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a corporation can be criminally liable for a conspiracy to defraud the United States, in violation of 18 U.S.C. 371, where all the co-conspirators are employees of the corporation.

2. Whether petitioner's conspiracy conviction should have been reversed because an alleged co-conspirator was acquitted at the same trial.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Ashland Oil, Inc. v. *Arnett*, 875 F.2d 1271 (7th Cir. 1989)	10
Busby v. *Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990)	9, 10
Buschi v. *Kirven*, 775 F.2d 1240 (4th Cir. 1985)	10-11
Cohen v. *United States*, 157 F. 651 (2d Cir.), cert. denied, 207 U.S. 596 (1907)	5
Copperweld Corp. v. *Independence Tube Corp.*, 467 U.S. 752 (1984)	5, 8, 9
Cortis v. *Kenney*, 995 F.2d 838 (8th Cir. 1993)	14
Dunn v. *United States*, 284 U.S. 390 (1932)	11, 12
Government of Virgin Islands v. *Hoheb*, 777 F.2d 138 (3d Cir. 1985)	14
Harris v. *Rivera*, 454 U.S. 339 (1981)	11, 13
Hartman v. *Board of Trustees of Community College District No. 508*, 4 F.3d 465 (7th Cir. 1993)	10
Hartzel v. *United States*, 322 U.S. 680 (1944)	13
Herrmann v . *Moore*, 576 F.2d 453 (2d Cir.), cert. denied, 439 U.S. 1003 (1978)	10
Hull v. *Cuyahoga Valley Joint Vocational School District Board of Education*, 926 F.2d 505 (6th Cir.), cert. denied, 501 U.S. 1261 (1991)	11
Joplin Mercantile Co. v. *United States*, 213 F. 926 (8th Cir. 1914), aff'd, 236 U.S. 531 (1915)	5

Cases—Continued: Page

Mininsohn v. *United States*, 101 F.2d 477 (3d Cir. 1939) 7
Morrison v. *United States*, 291 U.S. 82 (1934) 13
Novotny v. *Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235 (3d Cir. 1978), vacated, 442 U.S. 366 (1979) 7, 11
Perrin v. *United States*, 444 U.S. 37 (1979) 4
Richmond v. *Board of Regents of University of Minnesota*, 957 F.2d 595 (8th Cir. 1992) 11
Standefer v. *United States*, 447 U.S. 10 (1980) 11
Stathos v. *Bowden*, 728 F.2d 15 (1st Cir. 1984) 11
Travis v. *Gary Community Mental Health Center, Inc.*, 921 F.2d 108 (7th Cir. 1990), cert. denied, 112 S. Ct. 60 (1991) 10
United States v. *American Grain & Related Industries*, 763 F.2d 312 (8th Cir. 1985) 8
United States v. *Ames Sintering Co.*, 927 F.2d 232 (6th Cir. 1990) 7, 9
United States v. *Andrews*, 850 F.2d 1557 (11th Cir. 1988), cert. denied, 488 U.S. 1032 (1989) 14
United States v. *Boling*:
884 F.2d 924 (6th Cir. 1989), cert. denied, 493 U.S. 1082 (1990) 14, 15
869 F.2d 965, amended, 884 F.2d 924 (6th Cir. 1989), cert. denied, 493 U.S. 1082 (1990) 14
United States v. *Bucuvalas*, 909 F.2d 593 (1st Cir. 1990) 14
United States v. *Dakins*, 872 F.2d 1061 (D.C. Cir.), cert. denied, 493 U.S. 966 (1989) 14
United States v. *Dotterweich*, 320 U.S. 277 (1943) 11
United States v. *Garcia*, 882 F.2d 699 (2d Cir.), cert. denied, 493 U.S. 943 (1989) 14
United States v. *Hartley*, 678 F.2d 961 (11th Cir. 1982), cert. denied, 459 U.S. 1170 and 1183 (1983) 7, 10
United States v. *Howard*, 966 F.2d 1362 (10th Cir. 1992) 15

Cases—Continued: Page

United States v. *Hugh Chalmers Chevrolet-Toyota, Inc.*, 800 F.2d 737 (8th Cir. 1986) 8
United States v. *Mahar*, 801 F.2d 1477 (6th Cir. 1986) ... 7
United States v. *Mancari*, 875 F.2d 103 (7th Cir. 1989) .. 14
United States v. *Notarantonio*, 758 F.2d 777 (1st Cir. 1985) 8
United States v. *Peters*, 732 F.2d 1004 (1st Cir. 1984) 5, 6, 7
United States v. *Powell*, 469 U.S. 57 (1984) 3, 11, 12, 13
United States v. *S & Vee Cartage Co.*, 704 F.2d 914 (6th Cir.), cert. denied, 464 U.S. 935 (1983) 7
United States v. *Sachs*, 801 F.2d 839 (6th Cir. 1986) 15
United States v. *Sandy*, 605 F.2d 210 (6th Cir.), cert. denied, 444 U.S. 984 (1979) 15
United States v. *Sasser*, 974 F.2d 1544 (10th Cir. 1992), cert. denied, 113 S. Ct. 1063 (1993) 15
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 13
United States v. *Stevens*, 909 F.2d 431 (11th Cir. 1990) ... 6, 7, 9
United States v. *Suntar Roofing, Inc.*, 897 F.2d 469 (10th Cir. 1990) 15
United States v. *Thomas*, 900 F.2d 37 (4th Cir. 1990) 14
United States v. *Valles-Valencia*:
823 F.2d 381 (9th Cir. 1987) 14
811 F.2d 1232, amended, 823 F.2d 381 (9th Cir. 1987) ... 14
United States v. *Williams*, 341 U.S. 70 (1951) 13
United States v. *Zuniga-Salinas*, 952 F.2d 876 (5th Cir. 1992) 14

Statutes:

Commodity Credit Corporation Charter Act, 15 U.S.C. 714m(d) 8
Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*:
18 U.S.C. 1962 9
18 U.S.C. 1962(a) 10
18 U.S.C. 1962(c) 10

Statutes—Continued: Page

Sherman Act, 15 U.S.C. 1 *et seq.*:
§ 1, 15 U.S.C. 1 ..... 8, 9
15 U.S.C. 1986 8
18 U.S.C. 371 ..... 2, 4, 5, 6, 7, 9, 10, 11
21 U.S.C. 846 8
42 U.S.C. 1985(3) 10

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 20 F.3d 974. The opinion of the district court denying petitioner's motion for judgment of acquittal or a new trial (Pet. App. 14a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1994. A petition for rehearing was denied on May 13, 1994. Pet. App. 13a. The petition for a writ of certiorari was filed on August 11, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner, a corporation, was convicted of conspiracy to defraud the United States and to make false statements to a government agency, in violation of 18 U.S.C. 371. Petitioner was fined $3,500,000. The court of appeals affirmed (Pet. App. 1a-12a).

1. Petitioner manufactures and sells sophisticated electronic parts and equipment. Between 1985 and 1988, petitioner's Microelectronic Circuits Division (MCD) produced microelectronic circuits called hybrids under contract to the Department of Defense. Hybrids perform a variety of critical roles in the integral electronic works of missiles and weapons systems. The Department of Defense contract required that each hybrid pass a series of tests before shipment and that MCD maintain records of the tests or processes performed on the hybrids. Gov't C.A. Br. 4-6.

Donald LaRue was a general supervisor in the environmental test area of a manufacturing floor of MCD. The evidence at trial showed that LaRue and his superiors, Jim Temple and Frank Saia, agreed to eliminate certain tests and to falsify the results of others. For instance, LaRue instructed his employees not to reject on paper the hybrids that had failed "leak" tests. Further, LaRue instructed employees to "sign off" on records for thousands of hybrids even though the employees had not conducted the tests and did not have knowledge of the actual test results. When Margaret Goodearl, a supervisor in the MCD environmental test area, complained that MCD was not complying with the government contract, Temple warned Goodearl that she was not "part of the team." Likewise, Saia told Goodearl

that if she ever complained again, he would "fire her ass." Gov't C.A. Br. 4-12.

Petitioner and LaRue were jointly tried on two substantive false statement counts and a count charging conspiracy to defraud the United States. At the close of the evidence, the district court instructed the jury that to convict on the conspiracy charge, the jury would have to find that "LaRue and [petitioner], [petitioner] acting through LaRue, and at least one of the unindicted co-conspirators, namely, James Temple, Frank Saia, Margaret Goodearl and/or Marion Tolby, were members of the conspiracy." Pet. App. 31a. The jury found petitioner guilty on the conspiracy count and not guilty on the two substantive counts. The jury acquitted LaRue on all three counts. *Id.* at 2a-3a. The district court thereafter denied petitioner's post-verdict motion for a judgment of acquittal, holding that despite the "stark inconsistency" (*id.* at 28a) of the verdict, LaRue's acquittal did not provide a basis for setting aside petitioner's conspiracy conviction. *Id.* at 14a-28a.

2. The court of appeals affirmed. Pet. App. 1a-12a. The court held that a conspiracy verdict may not be set aside on grounds of inconsistency. *Id.* at 3a-6a. Quoting *United States* v. *Powell*, 469 U.S. 57, 68-69 (1984), the court explained: "[T]he Government's inability to invoke review, the general reluctance to inquire into the workings of the jury, and the possible exercise of lenity—suggest that the best course to take is simply to insulate jury verdicts from review on [inconsistency] ground [*sic*]." Pet. App. 5a. Accordingly, the court concluded, "the conviction of one co-conspirator is valid even when all the other co-conspirators are acquitted." *Id.* at 5a-6a.

The court also rejected petitioner's argument that it could not be convicted of conspiracy based entirely on the

acts of its employees. The court held that the language of 18 U.S.C. 371, which states that if "two or more persons conspire," each shall be punished, "does not exclude criminal liability for a corporation simply because its employees are the actual conspirators." Pet. App. 7a. The court further held that petitioner was not helped by the rule of lenity. The court explained that the rule could not be used "in complete disregard of the purpose of the legislature" (*ibid.*, quoting *Perrin* v. *United States*, 444 U.S. 37, 49 n.13 (1979)), and that petitioner's interpretation of the general conspiracy statute was "implausible and would undermine the purpose of the statute." Pet. App. 7a. The court declined petitioner's invitation to extend the "intracorporate conspiracy doctrine in antitrust law" to this criminal case. *Id.* at 8a. The court also rejected as "illogical" the public policy arguments proffered by petitioner in support of such an extension. *Id.* at 8a-9a. Finally, the court held that petitioner's conviction did not violate Wharton's Rule, which prevents a conspiracy conviction when an underlying substantive offense, such as adultery or dueling, requires more than one actor. The court pointed out that a single employee could defraud the United States or submit false statements to a government agency—the objects of the conspiracy in this case. *Id.* at 9a.

ARGUMENT

1. The court of appeals correctly rejected petitioner's argument that a corporation cannot be held liable under 18 U.S.C. 371, the general criminal conspiracy statute, for a conspiracy among its employees on the corporation's behalf. Contrary to petitioner's claim, the decision below is consistent with the decisions of every other circuit to have addressed the issue.

Section 371 provides that "[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, * * * and one or more of such persons do any act to effect the object of the conspiracy," each shall be punished by fine or imprisonment. Petitioner does not dispute that a corporation may be held liable under Section 371 for the acts of its employees where the employees conspire with someone outside the corporation. See Pet. 9, citing *Joplin Mercantile Co.* v. *United States*, 213 F. 926, 936 (8th Cir. 1914), aff'd, 236 U.S. 531 (1915). Nor does petitioner dispute that employees of a single corporation violate Section 371 when they conspire with each other to defraud the United States. See Pet. 9-10, citing *Cohen* v. *United States*, 157 F. 651, 653-654 (2d Cir.), cert. denied, 207 U.S. 596 (1907); see also *United States* v. *Peters*, 732 F.2d 1004, 1008 (1st Cir. 1984). And petitioner concedes that a corporation can be held liable for an intra-corporate conspiracy where at least one employee was acting for his "own ends." Pet. 9, citing, *inter alia*, *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 769 & n.15 (1984).

Petitioner nevertheless contends that a corporation escapes liability under Section 371 if all the conspiratorial acts are committed by employees of the corporation acting on the corporation's behalf. But the plain language of Section 371 does not support such a distinction. As long as there are two individual co-conspirators, as there were in this case,[1] the "two or more persons" requirement of Section 371 is satisfied.

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[1] The district court instructed the jury that it could not convict petitioner of conspiracy unless it found that LaRue and at least one of the unindicted co-conspirators were members of the conspiracy. Pet. App. 31a.

See Pet. 7. In such a case, the element of plurality is satisfied even if the corporation "stand[s] in the shoes" of each member of the conspiracy. See Pet. 6.[2] A corporation is vicariously liable for the corrupt actions of each employee who acts on the corporation's behalf. Neither the language of Section 371 nor its statutory purpose of punishing concerted action to defraud the United States suggests that Congress intended to insulate the corporation from liability where every co-conspirator is a corporate employee. As the First Circuit has held, in rejecting the "syllogism" that because acts of corporate officers constitute acts of the corporation, a corporation cannot conspire with its officers because to do so would amount to "conspir[ing] with itself,"

> [t]here is a world of difference between invoking the fiction of corporate personality to *subject* a corporation to civil liability for acts of its agents and invoking it to *shield* a corporation or its agents from criminal liability where its agents acted on its behalf.

United States v. *Peters*, 732 F.2d at 1008 n.7; see also *United States* v. *Stevens*, 909 F.2d 431, 432-433 (11th Cir. 1990) (rejecting "'single entity' theory that all agents of a corporation engaging in corporate conduct form a single, collective legal person").

Petitioner faults (Pet. 6-8) the court below for failing to interpret Section 371 in light of the common law of conspiracy. Petitioner, however, has not pointed to any

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[2] In this case, the district court instructed the jury that to convict petitioner, the jury had to find that the corporation "act[ed] through LaRue." Pet. App. 31a. Accordingly, on the record in this case, petitioner's liability did not rest on a finding that the corporation stood in the shoes of "each" co-conspirator. See Pet. 6.

common law support for its argument. Instead, petitioner notes only that conspiracy has traditionally required a "plurality" of actors. Pet. 7. Petitioner's argument would have more force if it had been convicted of conspiring with LaRue alone. See *United States* v. *Stevens*, 909 F.2d at 432-434 (reversing conspiracy conviction where there was "only one human actor, acting for himself and for the corporate entity which he control[led]"). But the jury instructions in this case eliminated that possibility; the instructions required the jury to find that LaRue conspired with at least one other natural person—one of the unindicted co-conspirators—thereby satisfying the long-established "element of plurality." See Pet. 7.

The courts of appeals have uniformly rejected petitioner's argument that a corporation is not accountable under Section 371 for the conspiratorial acts of its employees unless there is at least one noncorporate member of the conspiracy. See, *e.g.*, *United States* v. *Ames Sintering Co.*, 927 F.2d 232, 236-237 (6th Cir. 1990); *United States* v. *Peters*, 732 F.2d at 1007-1008 & n.7; *United States* v. *S & Vee Cartage Co.*, 704 F.2d 914, 920 (6th Cir.), cert. denied, 464 U.S. 935 (1983); *United States* v. *Hartley*, 678 F.2d 961, 970-972 (11th Cir. 1982) (dictum), cert. denied, 459 U.S. 1170 and 1183 (1983); *Novotny* v. *Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235, 1258 n.120 (3d Cir. 1978) (en banc) (dictum), vacated on other grounds, 442 U.S. 366 (1979); *Mininsohn* v. *United States*, 101 F.2d 477, 478 (3d Cir. 1939) (affirming Section 371 conviction of corporation and its two officers without discussing absence of any noncorporate co-conspirators). See also *United States* v. *Mahar*, 801 F.2d 1477, 1488 & n.19 (6th Cir. 1986) (affirming conviction of medical clinic for conspiracy among its employees to distribute controlled substances

(21 U.S.C. 846)); *United States* v. *Hugh Chalmers Chevrolet-Toyota, Inc.*, 800 F.2d 737, 738 (8th Cir. 1986) (affirming corporation's conviction for conspiracy between manager and employee to disconnect automobile odometers (15 U.S.C. 1986)); *United States* v. *American Grain & Related Industries*, 763 F.2d 312, 320 (8th Cir. 1985) (corporation can be held liable for intra-corporate conspiracy to violate Commodity Credit Corporation Charter Act (15 U.S.C. 714m(d)).

United States v. *Notarantonio*, 758 F.2d 777 (1st Cir. 1985), on which petitioner relies (Pet. 11), does not conflict with these decisions. In that case, the court of appeals affirmed the conspiracy convictions of a corporation, an employee of the corporation, and a second individual who worked elsewhere. The court noted that the "plurality of actors necessary to establish a conspiracy [was] present despite the fact that [the employee] and the [corporation] could not by themselves constitute a conspiracy." 758 F.2d at 789. Accordingly, the court did not reach the question whether the corporation would have been liable if it had employed both of the individual co-conspirators. Because the First Circuit answered that question affirmatively in *Peters*, the First and Ninth Circuits agree on the answer to the question presented here.

Petitioner relies on case law holding that Section 1 of the Sherman Act, 15 U.S.C. 1, does not apply to intra-corporate or intra-enterprise conspiracies. See Pet. 12, citing, *e.g.*, *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984). But this Court rested its decision in *Copperweld* on the Sherman Act's distinctive intent and purpose. Section 1 of the Sherman Act prevents two or more enterprises from joining their economic power to restrain trade; it does not apply to unilateral action by a single enterprise. See

Copperweld, 467 U.S. at 771-775. Because Congress recognized that a prohibition on unilateral action could impede the ability of a single enterprise to compete in the marketplace, this Court held in *Copperweld* that Section 1 of the Sherman Act does not apply to intra-enterprise agreements. 467 U.S. at 775 ("Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote."). Petitioner does not suggest, however, that in enacting Section 371, Congress likewise intended to leave unchecked a corporation's ability to defraud the United States through the concerted actions of its employees. There is therefore no basis for engrafting an intra-corporate exception onto the broad language of Section 371. See *United States* v. *Stevens*, 909 F.2d at 432 (distinguishing antitrust context in which "the single entity theory first arose"); *United States* v. *Ames Sintering Co.*, 927 F.2d at 236 (same).[3]

Petitioner's reliance on the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962, is equally misplaced. See Pet. 14-16. Section 1962 proscribes a series of offenses committed by "any person" who conducts or participates in the conduct of the affairs of an "enterprise" through a pattern of racketeering activity. The courts of appeals have held that the liability of the "enterprise" or corporation turns on the language used in the subsections of Section 1962 to define each particular offense. See *Busby* v. *Crown*

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[3] As the court of appeals noted in rejecting petitioner's identical claim, "[i]f we applied the intracorporate conspiracy doctrine to this case, no corporation acting on its own behalf by and through its employees could be found guilty of conspiracy. This result is illogical." Pet. App. 8a-9a.

Supply, Inc., 896 F.2d 833, 840-841 (4th Cir. 1990) (en banc) (observing that most circuits have held that the "enterprise" can violate subsection (a) but not subsection (c)).[4] See also *Ashland Oil, Inc.* v. *Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989) (a corporation and its employees can violate subsection (c) if they have conspired to conduct the affairs of a separate enterprise through a pattern of racketeering activity). Because the rationale of these cases is dependent on the statutory language, and because the RICO statute is strikingly different from Section 371, the general criminal conspiracy statute, the RICO decisions have little, if any, relevance to petitioner's conviction.

Nor is review warranted here in order to settle the question whether the intra-corporate conspiracy doctrine applies to civil rights suits filed under 42 U.S.C. 1985(3). See Pet. 13 & n.7.[5] Whatever the proper

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[4] Section 1962(c) states that "[i]t shall be unlawful for any person employed by or associated with any enterprise * * * to conduct or participate * * * in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. 1962(c). Based on that language, all but one circuit has held that the "person" who violates the provision must be distinct from the "enterprise." See *Busby*, 896 F.2d at 840 & n.7. Compare *United States* v. *Hartley*, 678 F.2d at 988 ("A corporation may be simultaneously both a defendant and the enterprise under RICO.").

[5] Some courts have held that "managers of a corporation jointly pursuing its lawful business do not become 'conspirators' [under § 1985] when acts within the scope of their employment are said to be discriminatory or retaliatory." *Hartman* v. *Board of Trustees of Community College District No. 508*, 4 F.3d 465, 469 (7th Cir. 1993), quoting *Travis* v. *Gary Community Mental Health Center, Inc.*, 921 F.2d 108, 110 (7th Cir. 1990), cert. denied, 112 S. Ct. 60 (1991). Accord *Herrmann* v. *Moore*, 576 F.2d 453, 459 (2d Cir.), cert. denied, 439 U.S. 1003 (1978); *Buschi* v. *Kirven*, 775 F.2d 1240,

resolution of that question, it is clear that Congress has the authority to impose liability on a corporation for the unlawful, conspiratorial acts of its employees. Whether Congress has done so in the civil rights, antitrust, or RICO statutes sheds little light on whether petitioner was properly convicted under Section 371. Because petitioner has failed to show that its intra-corporate conspiracy claim would have prevailed in any circuit, the judgment below does not warrant further review.

2. Petitioner also contends (Pet. 17) that the court of appeals should have reversed its conspiracy conviction because the same jury acquitted LaRue, "an indispensable party to any such conspiracy." But the law is settled that "[i]nconsistency in a verdict is not a sufficient reason for setting it aside." *Harris* v. *Rivera*, 454 U.S. 339, 345 (1981) (per curiam). That principle was first enunciated in *Dunn* v. *United States*, 284 U.S. 390, 393-394 (1932), and has "stood without exception in this Court" ever since. *United States* v. *Powell*, 469 U.S. 57, 69 (1984). See also *Standefer* v. *United States*, 447 U.S. 10, 22-25 (1980); *United States* v. *Dotterweich*, 320 U.S. 277, 279 (1943). The *Dunn* rule has been applied by the Court "with respect to inconsistency between verdicts on separate charges against one defendant, and also with respect to verdicts that treat codefendants in a joint trial inconsistently." *Harris*, 454 U.S. at 345 (citation and footnote omitted). The rule precluding review of

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1252 (4th Cir. 1985); *Hull* v. *Cuyahoga Valley Joint Vocational School District Board of Education*, 926 F.2d 505, 509 (6th Cir.), cert. denied, 501 U.S. 1261 (1991); *Richmond* v. *Board of Regents of University of Minnesota*, 957 F.2d 595, 598 (8th Cir. 1992). Others have refused to apply the intra-corporate conspiracy doctrine where the corporation and its employees engaged in more than "a single act" of discrimination. *Stathos* v. *Bowden*, 728 F.2d 15, 21 (1st Cir. 1984) (Breyer, J.); *Novotny*, 584 F.2d at 1256-1259.

inconsistent verdicts is founded on the recognition that a jury's acquittal may result not from a failure of proof, but from "mistake, compromise, or lenity." *Powell*, 469 U.S. at 65; see also *Dunn*, 284 U.S. at 394. The rule also reflects the practical reality that, as a result of double jeopardy considerations, the government is precluded from seeking review of the unfavorable aspects of inconsistent jury verdicts. *Powell*, 469 U.S. at 65. Under these circumstances, to permit defendants to void inconsistent verdicts would create a one-way ratchet benefitting defendants—despite the possibility that the acquittal portion of the inconsistent verdict was already a "windfall" bestowed by a jury "convinced of guilt." *Ibid.*

The rule of *Dunn* applies with full force in the conspiracy context. Much as it would be "pure speculation" (*Powell*, 469 U.S. at 66) to assume that an acquittal of one of two identically situated co-defendants in a joint trial where the other defendant was convicted reflects the jury's "true" verdict, it would be "pure speculation" to assume that the acquittal of a co-conspirator signifies a jury's conclusion that no conspiracy existed between that defendant and his convicted co-conspirator. The acquittal could equally well reflect the jury's "mistake, compromise, or lenity." *Id.* at 65. Such speculation is in any event unnecessary. "[A] criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts." *Id.* at 67. Significantly, petitioner does not challenge the sufficiency of the evidence against it in this case.

Petitioner errs when it states (Pet. 19) that since *Dunn*, this Court has "recognized and applied" a contrary rule requiring verdict consistency in con-

spiracy cases. Petitioner relies principally on *Hartzel* v. *United States*, 322 U.S. 680 (1944), but that case did not involve an inconsistent verdict; on the contrary, the jury returned guilty verdicts against the defendant and his two alleged co-conspirators. *Id.* at 682 n.3. The Court set aside the defendant's conspiracy conviction because the verdicts against his co-defendants, his sole alleged co-conspirators, had been set aside by the lower courts on the ground that the evidence of their guilt was legally insufficient. The Court concluded, based on the lower court rulings, that the evidence was therefore insufficient as a matter of law to show that any conspiracy existed. *Ibid.* Indeed, with the exception of *Harris* v. *Rivera*, *supra*, none of the cases relied on by petitioner involved an inconsistent verdict. See *Morrison* v. *California*, 291 U.S. 82, 93 (1934); *United States* v. *Williams*, 341 U.S. 70, 86 (1951) (Black, J., concurring in the result); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 246 (1940); see also Pet. App. 3a n.4 (distinguishing *Hartzel* and *Morrison* as not involving inconsistent jury verdicts). In *Harris*, the Court upheld the defendant's conviction even though the trial judge had inexplicably acquitted an identically situated co-defendant during the same bench trial. The Court did not suggest that the result would have been different had the charge been conspiracy. Although the Court cited *Hartzel* with approval, see 454 U.S. at 345 n.13, the Court was careful to point out that in *Hartzel* the trial court had set aside a jury's consistent verdict of convictions. Accordingly, none of these decisions undermines the accuracy of this Court's pronouncement in *Powell*: "The rule established in *Dunn* v. *United States* has stood without exception" since 1932, and it should "remain that way." 469 U.S. at 69.

Since this Court's decision in *Powell*, every court of appeals that has squarely considered whether the *Dunn* rule extends to conspiracy verdicts has held that it does. *United States* v. *Zuniga-Salinas*, 952 F.2d 876 (5th Cir. 1992) (en banc); *United States* v. *Bucuvalas*, 909 F.2d 593, 595-597 (1st Cir. 1990); *United States* v. *Thomas*, 900 F.2d 37, 40 (4th Cir. 1990); *United States* v. *Andrews*, 850 F.2d 1557, 1561-1562 (11th Cir. 1988) (en banc), cert. denied, 488 U.S. 1032 (1989); *United States* v. *Valles-Valencia*, 823 F.2d 381, 382, amending 811 F.2d 1232 (9th Cir. 1987). Other courts, citing this Court's decision in *Powell*, have expressed grave doubts about the continuing validity of any "rule of consistency" exception in conspiracy cases to the inconsistent-verdict rule. See, *e.g.*, *Cortis* v. *Kenney*, 995 F.2d 838, 840-841 & n.2 (8th Cir. 1993); *United States* v. *Mancari*, 875 F.2d 103, 104-105 (7th Cir. 1989); *United States* v. *Dakins*, 872 F.2d 1061, 1065-1066 (D.C. Cir.), cert. denied, 493 U.S. 966 (1989); *Government of Virgin Islands* v. *Hoheb*, 777 F.2d 138, 142 n.6 (3d Cir. 1985); *id.* at 142-143 (Garth, J., concurring); see also *United States* v. *Garcia*, 882 F.2d 699, 704-705 (2d Cir.) (citing *United States* v. *Andrews*, *supra*), cert. denied, 493 U.S. 943 (1989).

Contrary to petitioner's suggestion (Pet. 21-22), neither the Sixth Circuit nor the Tenth Circuit has charted a different course. In *United States* v. *Boling*, 884 F.2d 924, amending 869 F.2d 965 (6th Cir. 1989), cert. denied, 493 U.S. 1082 (1990), on which petitioner relies (Pet. 21-22), a jury convicted both co-conspirators (Lauback and Boling). The Sixth Circuit thereafter vacated Boling's conviction and remanded for a new trial on the ground that her attorney was disabled by a conflict of interest. The court vacated Lauback's conviction as well, explaining that Lauback was entitled to this "windfall" because Boling was his only indicted

co-conspirator. The court further held that if either Boling or Lauback was found not guilty at the retrial, "the conviction of the other may not be upheld." 869 F.2d at 973.

On rehearing, the Sixth Circuit reinstated Lauback's conspiracy conviction. In so doing, the court noted that it had previously criticized the rule of consistency for conspiracy verdicts. *United States* v. *Boling*, 884 F.2d at 925, citing *United States* v. *Sandy*, 605 F.2d 210, 215 (6th Cir.), cert. denied, 444 U.S. 984 (1979). Ultimately, however, the court did not resolve the question whether conspiracy verdicts must be consistent where all known co-conspirators are tried together, because settled circuit law established that even if Boling were acquitted at the retrial, an acquittal of the sole co-conspirator at a separate trial would not furnish a basis for vacating Lauback's conspiracy conviction. 884 F.2d at 926, quoting *United States* v. *Sachs*, 801 F.2d 839, 845 (6th Cir. 1986).

Likewise, the Tenth Circuit has not yet considered whether, in the aftermath of *Powell*, conspiracy verdicts must be consistent. See *United States* v. *Sasser*, 974 F.2d 1544, 1560-1561 & n.8 (10th Cir. 1992) ("Because we conclude that this case does not present us with a situation where we have inconsistent verdicts, we do not address whether *Powell* overrules [circuit precedent establishing rule of consistency]."), cert. denied, 113 S. Ct. 1063 (1993); *United States* v. *Howard*, 966 F.2d 1362, 1363-1364 (10th Cir. 1992) (declining to decide the issue "until we have before us a case in which all alleged coconspirators are tried together by a jury and all but one are acquitted"); *United States* v. *Suntar Roofing, Inc.*, 897 F.2d 469, 475-477 (10th Cir. 1990) ("the facts of this case do not demand the resolution of" that issue). In both *Suntar Roofing* and *Howard*, the evidence showed

that the defendants had conspired with individuals other than their acquitted co-defendants.[6] In *Sasser*, the jury failed to reach a verdict on the guilt of the co-conspirators. Consequently, in each of the Tenth Circuit cases cited by petitioner (Pet. 21), the verdict was not inconsistent. Because there is no live circuit conflict at this time, further review of petitioner's inconsistent verdict claim is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

OCTOBER 1994

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[6] In the instant case, the evidence also showed that there were several co-conspirators. Although petitioner's conviction should not therefore have depended on LaRue's participation in the conspiracy, the district court instructed the jury that it could not convict petitioner or LaRue unless it found that LaRue "and at least one of the unindicted co-conspirators * * * were members of the conspiracy." Pet. App. 31a. In light of that instruction, the verdict can fairly be characterized as inconsistent.

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No. 94-262

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

HUGHES AIRCRAFT COMPANY, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

HERBERT J. MILLER, JR.
(Counsel of Record)
STUART A. LEVEY
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Counsel for Amicus Curiae

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16 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

ARGUMENT 2

I. THE INTRACORPORATE CONSPIRACY DOCTRINE PROTECTS CORPORATIONS FROM UNDESERVED CRIMINAL LIABILITY 2

II. THE RULING BELOW UNDERMINES RESPONSIBLE CORPORATIONS' EFFORTS TO COMPLY WITH THE LAW . . . 7

III. THE RULING BELOW CREATES AN UNFAIR DANGER OF SUSPENSION OR DEBARMENT FROM GOVERNMENT CONTRACTING 9

IV. THE "QUI TAM" PROVISIONS OF FEDERAL LAW ADD TO THE UNFAIRNESS OF THE DECISION BELOW 10

CONCLUSION 12

TABLE OF AUTHORITIES

CASES **Page(s)**

Hull v. Schuck,
111 S. Ct. 2917 (1991) 2

Pinkerton v. United States,
328 U.S. 640 (1946) 6

United States v. Boone,
951 F.2d 1526 (9th cir. 1991) 5

United States v. Curry,
977 F.2d 1042 (7th Cir. 1992),
cert. denied, 113 S. Ct. 1357 (1993) 5

United States v. Dege,
364 U.S. 51, 57 (1960) 4, 5

United States v. Fliegler,
756 F. Supp. 688 (E.D.N.Y. 1990) 11

United States ex. rel Hagood
v. Sonoma County Water Agency,
929 F.2d 1416 (9th Cir. 1991) 11

United States v. Ivey,
915 F.2d 380 (8th Cir. 1990) 5

United States v. Moran,
984 F.2d 1299 (1st Cir. 1993) 5

United States. v. Rabinowich,
238 U.S. 78, 88 (1915) 3, 4

United States v. Restrepo,
930 F.2d 705 (9th Cir. 1991) 5

United States v. Zan Mach. Co.,
803 F. Supp. 620 (E.D.N.Y. 1992) 11

STATUTES AND RULES

18 U.S.C. § 371 4

31 U.S.C. § 3729 . . . . . 10, 11

31 U.S.C. § 3730 11

48 C.F.R. Ch. 2 § 252.203-7002 8

48 C.F.R. subpart 9.4 (1993) 9

OTHER AUTHORITIES

10 W. Fletcher
Cyclopedia of the Law of Private Corporations § 4884
(Zajdel ed. 1986) 5

Federal Sentencing Guidelines
§ 8C2.5(f) 8

J. Kaplan, J. Murphy & W. Swenson
Compliance Programs and the Corporate Sentencing Guidelines (1993) 8

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BRIEF OF AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Aerospace Industries Association of America, Inc. ("AIA") is the national trade association representing the manufacturers of aerospace equipment. The defense contractors who are members of AIA derive a substantial part of their business from prime contracts with the United States or subcontracts received from prime contractors and are thus subject to the False Claims Act and to U.S. Government debarment procedures.

The views in this brief reflect the importance of the intracorporate conspiracy doctrine to American corporations,

and especially to those corporations that do substantial business with the government.

Pursuant to Supreme Court Rule 37.2, we have obtained the consent of all parties in this action to file this brief in support of the petitioner. Letters of consent are on file with the Clerk of this Court.

ARGUMENT

I

THE INTRACORPORATE CONSPIRACY DOCTRINE PROTECTS CORPORATIONS FROM UNDESERVED CRIMINAL LIABILITY

The decision below permits the conviction of a corporation for conspiracy even when *all* of the alleged conspirators are employees and agents of the same corporation. A corporation, according to that ruling, can conspire criminally with itself. Not only is that ruling facially illogical, it extends the criminal liability of corporations beyond that of natural persons since natural persons, of course, cannot conspire with themselves.

The lower court, in both its reasoning and its result, rejects the common law intracorporate conspiracy doctrine, which precludes imputation of conspiracy liability to corporations solely on the basis of intracorporate activity. The application of this doctrine to federal civil and criminal conspiracy statutes is a disputed question in the federal courts (*see* Hughes Cert. Pet. at pp. 10-16), which members of this Court have already recognized should be clarified. *See Hull v. Shuck*, 111 S. Ct. 2917 (1991) (White, J. and Marshall, J.,

dissenting from the denial of certiorari) (noting conflict among the circuits regarding use of intracorporate conspiracy rule in civil rights cases).

The Hughes petition for certiorari demonstrates that the decision below is incompatible with straightforward principles of statutory construction. The lower court, rather than reconciling its reasoning with the plain language of the statute, preferred to rest its result on the completely inaccurate premise that application of "the intracorporate conspiracy doctrine to this case [would mean] no corporation acting on its own behalf by and through its employees could be found guilty of conspiracy." Pet. at 8a-9a. This is simply wrong: application of the intracorporate conspiracy doctrine to a case where the sole participants in the conspiracy are employees of the same corporation only means that a corporation cannot be convicted of conspiring with itself. Where corporations, through their employees, conspire with others, they remain just as liable for the crime of criminal conspiracy as other defendants.

The ruling below effectively undermines the very basis for criminalizing conspiracies in the first place. As stated in *United States v. Rabinowich*, 238 U.S. 78, 88 (1915):

> For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring

> more time for its discovery, and adding to the importance of punishing it when discovered.

The *Rabinowich* case states the traditional rationale for independent criminal liability based on conspiratorial behavior: when two individuals or separate corporate entities combine for the deliberate purpose of committing a crime against the state, the very act of combination is both a departure from normal behavior and a special threat to the stability of the community. That social threat, recognized by the traditional law of criminal conspiracy, is a far cry from the circumstance that may arise in any large corporation when an individual engages in and discusses a particular act of malfeasance with co-workers or supervisors. Corporations, by their very nature, are cooperative group enterprises, dependent upon hierarchical structures and multiple layers of reporting for all internal activity. Under the ruling below, as a practical matter, every individual act of malfeasance in a corporation can be converted by a prosecutor into a "corporate conspiracy" simply by virtue of the recording and reporting of the activity within the corporate structure -- even if an official high up in the corporation stops the inchoate malfeasance before any substantive crime is committed.

Similar concerns, in part, caused courts to hesitate before finally eliminating the ancient rule that husbands and wives could not be convicted of conspiracy with each other. As Chief Justice Warren explained, "A wife, simply by virtue of the intimate life she shares with her husband, might easily perform acts that would technically be sufficient to involve her in a criminal conspiracy with him, but which might be far removed from the arm's-length agreement typical of that crime." *United States v. Dege*, 364 U.S. 51, 57 (1960) (dissenting opinion). The *Dege* Court held that husband-wife conspiracies were punishable under 18 U.S.C. § 371 because

the common law notion that a married couple is really only one person had long since been rejected as archaic. *See Dege*, 364 U.S. at 53-54. Chief Justice Warren's dissenting concerns apply equally strongly here -- corporate employees are necessarily engaged in group endeavors -- but there has been no corresponding departure from the common law. A corporation is still one person in the eyes of the law, *see* 10 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 4884 at 361 (Zajdel ed. 1986), and thus it cannot be liable for conspiring with itself.

The ease by which the government may prove an intracorporate "conspiracy" makes this problem all the more severe. To win a conviction under 18 U.S.C. § 371, the government need not prove an explicit agreement to defraud the United States. Indeed, by far the more common approach is to establish an agreement by asking the jury to infer one from the circumstances of the case, *see, e.g., United States v. Curry*, 977 F.2d 1042 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1357 (1993); *United States v. Restrepo*, 930 F.2d 705 (9th Cir. 1991), *United States v. Ivey*, 915 F.2d 380 (8th Cir. 1990), and the agreement that is "proven" may well be an implicit one.[1] *See, e.g., United States v. Boone*, 951 F.2d 1526 (9th Cir. 1991). Conspiracies are typically proven by circumstantial evidence -- that two co-conspirators met at a certain time or place or that they communicated in some way.

Given these rules of proof, it is extraordinarily easy to "establish" an intracorporate conspiracy. The mere recording

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[1] Thus, although jury instructions use the term "agreement," such agreements need not be articulated at all but rather may be implicit in a working relationship between the parties. *See, e.g., United States v. Moran*, 984 F.2d 1299 (1st Cir. 1993).

and reporting of any particular individual employee's act of malfeasance through the normal course of intracorporate memos and meetings becomes evidence of "agreement" supporting a charge of "criminal conspiracy." The practical result is that the corporation ends up being charged for criminal conspiracy where the real "criminal" conduct was a unilateral act of employee malfeasance.

As far back as 1946, this Court recognized the danger inherent in overly harsh doctrines of criminal conspiracy law. In *Pinkerton v. United States*, 328 U.S. 640, 644 n.4 (1946), this Court warned that "the addition of a conspiracy count may at times be abusive and unjust."[2] It quoted the Report of the Conference of Senior Circuit Judges in 1925:

> Although in a particular case there may be no preconcert of plan, excepting that necessarily inherent in mere joint action, it is difficult to exclude that situation from the established definitions of conspiracy; yet the theory which permits us to call the aborted plan a greater offense than the completed crime supposes a serious and substantially continued group scheme for cooperative law breaking. We observe so many conspiracy prosecutions which

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2 In *Pinkerton v. United States*, 328 U.S. 640 (1946), this Court held that where two brothers had conspired to commit substantive offenses, the conviction of both brothers on the substantive counts could stand even though one brother did not participate in any way in committing the substantive crimes.

Applying this doctrine to intracorporate agreements thus potentially subjects the corporation found guilty of conspiring with itself to liability for any substantive offense subsequently committed by an employee pursuant to that "conspiracy" -- even if that offense was not within scope of the employee's duties.

> do not have this substantial base that we fear the creation of a general impression, very harmful to law enforcement, that this method of prosecution is used arbitrarily and harshly. Further the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant.

Annual Report of the Attorney General for 1925, pp. 5-6 (quoted in *Pinkerton*, 328 U.S. at 644 n.4). Those fears are all the more severe when the government's advantages are combined with the Ninth Circuit's ruling below.[3]

II

THE RULING BELOW UNDERMINES RESPONSIBLE CORPORATIONS' EFFORTS TO COMPLY WITH THE LAW

Corporations, like AIA members, that do substantial business with the government make significant efforts to avoid criminal wrongdoing by implementing extensive compliance programs. Such responsible corporations also make every effort to promote to positions of authority only those people who deal ethically and honestly with the government. As a practical matter, the ruling below undermines those efforts.

Under the decision below, a corporation is criminally liable for conspiracy when two of its own employees agree to

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[3] In fact, the trial judge in the *Hughes* case stated that the conspiracy count (under which Hughes was convicted) was used by the government to introduce otherwise inadmissible evidence to "dirty the water." Tr. 3/2/92 at p. 35.

defraud the government and either employee commits any overt act in furtherance of that agreement. That liability is *not* eliminated even if the corporation's own internal compliance mechanism or a responsible corporate official discovers the problem and prevents the substantive fraud or crime from occurring.

Subjecting corporations to criminal liability for conspiracy in such circumstances is counterproductive and unfair to both the corporation's shareholders and its executives alike. The *corporation*, as an entity, has done everything it can reasonably be expected to do to prevent fraud. Virtually all major defense contractors, and all members of AIA, spend substantial sums of money each year on such compliance programs. In large defense contractors, such programs are elaborate, consisting of anonymous hotlines, separate internal audit divisions, training programs, published codes of conduct and so on. *See generally* J. Kaplan, J. Murphy & W. Swenson, *Compliance Programs and the Corporate Sentencing Guidelines* (1993). These compliance programs are expressly encouraged, as a matter of federal policy, by the Federal Sentencing Guidelines, *see Federal Sentencing Guidelines* § 8C2.5(f), by federal regulations, *see* 48 C.F.R. Ch. 2 § 252.203-7002 (mandatory hotlines), and by institutionalized voluntary disclosure programs such as the one administered by the Department of Defense. In large organizations, malfeasance can occur despite diligent efforts to prevent it. These compliance programs recognize that fact and seek to ensure that, despite any such problem, no false statements are actually made to the government and no other violations of law occur.

To subject the corporation to criminal liability -- notwithstanding the *successful* operation of its compliance programs -- makes a mockery of a responsible corporation's

attempts to obey the law while doing business with the government. Under the Ninth Circuit's ruling, even the best corporate compliance efforts can provide only illusory comfort to the corporation's shareholders: the corporation may well be convicted of internal "conspiracies," even if the corporation succeeds in preventing any substantive offenses.

III

THE RULING BELOW CREATES AN UNFAIR DANGER OF SUSPENSION OR DEBARMENT FROM GOVERNMENT CONTRACTING

Any corporation which deals with the federal government may be suspended or debarred from dealing with the government under established regulations if indicted or convicted of a crime. See 48 C.F.R. subpart 9.4 (1993). For many corporations that rely on government contracts, debarment is tantamount to a corporate death sentence.

The ruling below enables a prosecutor to convert virtually any unilateral employee malfeasance into a "corporate conspiracy" to enhance the possibility of a conviction and thus of suspension and debarment. Moreover, the ruling below gives prosecutors enormous leverage to extract unreasonable "settlement" agreements from corporations that rely on government business since the mere act of charging a criminal conspiracy may be disastrous for the contractor (and especially for the smaller contractor) who may be suspended merely by virtue of an indictment. Lest this seem unlikely, we note that the prosecutor below candidly informed the trial judge:

> One of the interests in obtaining a conviction is obtaining a conviction on a crime that might have an impact not only with the court but with suspension and debarment. They are far more interested in the conspiracy count because that says a lot more to them about the nature of this operation at least in 1986 and 1987 than a few isolated days in November or two hybrids out of thousands that were processed in December of 1986. The substantive counts simply do not send enough information for other purposes as well, and to be candid with you, that is one of our responsibilities is why we bring the conspiracy count.[4]

IV

THE "QUI TAM" PROVISIONS OF FEDERAL LAW ADD TO THE UNFAIRNESS OF THE DECISION BELOW

As large defense contractors, the members of AIA are well-acquainted with the False Claims Act, 31 U.S.C. § 3729, and expend considerable effort and money ensuring that no false claims are made to the government. The rule announced by the Ninth Circuit creates a perverse incentive for corporate employees to create intracorporate "conspiracies" -- which violate that act, *see* 31 U.S.C. § 3729(a)(3) -- and then to profit by their own violations through *qui tam* actions under 31 U.S.C. § 3730.

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[4] Tr. 3/18/92 at p. 29.

We acknowledge, of course, that the *qui tam* provisions of federal law are specifically designed to create an incentive for corporate employees to report wrongdoing by their companies. But the rule adopted by the Ninth Circuit below creates an enormous loophole, allowing would-be intracorporate "conspirators" to acquire the proverbial pot of gold from the corporation, even where, as here, no false statement is ultimately made to the government.[5] Suppose that a corporate employee brings a *qui tam* action based on his own "conspiracy" with a co-worker to defraud the government. Even if the corporation's compliance programs or a high-ranking corporate official successfully prevented any false claim from being made to the government, the company would, under the Ninth Circuit's rule, be liable under the False Claims Act, 31 U.S.C. § 3729(a)(3), for "conspir[ing] to defraud the Government." The *qui tam* plaintiff would be entitled to an award of up to 30% of the proceeds of the action, plus his or her attorneys' fees and costs.[6] This is true even though he or she was a participant in the wrongdoing. *See* 31 U.S.C. § 3730(d)(3).[7]

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[5] Indeed, in this very case, one of the unindicted "co-conspirators," Margaret Goodearl, is a *qui tam* plaintiff.

[6] Even if the Government suffered no loss, the corporation would still be liable under the False Claims Act, *see United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991), and could be forced to pay substantial penalties, *see, e.g., United States v. Zan Mach. Co.*, 803 F. Supp. 620 (E.D.N.Y. 1992); *United States v. Fliegler*, 756 F. Supp. 688 (E.D.N.Y. 1990) (imposing $5,000 fine for each of 32 violations).

[7] If the action was brought by the person who planned or initiated the violation of § 3729, the court *may* reduce that person's share of the proceeds. Any person convicted of a crime involving the § 3729 complaint is barred from collecting the proceeds.

CONCLUSION

Because of the confusion in the law of conspiracy and the serious and unfair impact of the decision below on corporations, this Court should grant the petition for certiorari.

Respectfully submitted,

HERBERT J. MILLER, JR.
STUART A. LEVEY
MILLER, CASSIDY, LARROCA
& LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Counsel for Amicus Curiae

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HUGHES AIRCRAFT COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

Of Counsel:

ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Dated: October 12, 1994

HERBERT L. FENSTER
Counsel of Record
ANDREW N. PETRAKES
MCKENNA & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500
Attorneys for Amicus Curiae The Chamber of Commerce of the United States of America

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE CONVICTION OF ONE CO-CONSPIRATOR DESPITE THE ACQUITTAL OF THE OTHER, WHO IS A NECESSARY PARTY TO SUCH CONSPIRACY, CANNOT BE UPHELD	4
A. The Acquittal of LaRue, an Indispensable Party to the Alleged Conspiracy, Precludes the Existence of a Conspiracy	4
B. The General Rule Upholding Inconsistent Verdicts as to Individual Defendants Is Not Applicable to Conspiracy Cases	8
II. WITHOUT THE PARTICIPATION OF LARUE, THE CONSPIRACY OF WHICH HUGHES WAS CONVICTED COULD ONLY CONSIST OF ONE EMPLOYEE AND, THUS, CANNOT BE UPHELD	12
CONCLUSION	20
APPENDIX	1a

TABLE OF AUTHORITIES

CASES — Page

Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985) 7
Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) 7
City of Los Angeles v. Heller, 475 U.S. 796 (1986) (per curiam) 7, 8
Davis v. United States, 160 U.S. 469 (1895) 18
DeMarco v. United States, 415 U.S. 449 (1974) 6
Dunn v. United States, 284 U.S. 390 (1932) 9, 10, 12
Francis v. Franklin, 471 U.S. 307 (1985) 18
Harris v. Rivera, 454 U.S. 339 (1981) (per curiam) 9
Hartzel v. United States, 322 U.S. 680 (1944) 9, 10, 12
Iannelli v. United States, 420 U.S. 770 (1975) 15, 18
In re Winship, 397 U.S. 358 (1970) 18
Maine v. Taylor, 477 U.S. 131 (1986) 6, 7, 8
Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953) 16
Palazzo v. Gulf Oil Corp., 764 F.2d 1381 (11th Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986) 5, 14
Pullman-Standard v. Swint, 456 U.S. 273 (1982) 6
Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533 (1983) (per curiam) 10
United States v. Ames Sintering Co., 927 F.2d 232 (6th Cir. 1990) (per curiam) 13
United States v. Carroll, 144 F. Supp. 939 (S.D. N.Y. 1956), *aff'd sub nom. United States v. Sheba Bracelets, Inc.*, 248 F.2d 134 (2d Cir.), *cert. denied*, 355 U.S. 904 (1957) 14, 15, 16, 17
United States v. General Dynamics Corp., 644 F. Supp. 1497 (C.D. Cal. 1986), *rev'd on other grounds*, 828 F.2d 1356 (9th Cir. 1987) 17
United States v. Hartley, 678 F.2d 961 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983) 13
United States v. Hughes Aircraft Co., 20 F.3d 974 (9th Cir. 1994) ..... *passim*
United States v. Kismetoglu, 476 F.2d 269 (9th Cir.) (per curiam), *cert. dismissed*, 410 U.S. 976 (1973) 10

TABLE OF AUTHORITIES—Continued

Page

United States v. Lopez, 989 F.2d 1032 (9th Cir. 1993) 6, 7
United States v. Mancillas, 580 F.2d 1301 (7th Cir.), *cert. denied*, 439 U.S. 958 (1978) 18
United States v. Notarantonio, 758 F.2d 777 (1st Cir. 1985) 13
United States v. Peters, 732 F.2d 1004 (1st Cir. 1984) 14
United States v. Powell, 469 U.S. 57 (1984) 9, 10, 11, 12
United States v. S & Vee Cartage Co., 704 F.2d 914 (6th Cir.), *cert. denied*, 464 U.S. 935 (1983) 13
United States v. Stevens, 909 F.2d 431 (11th Cir. 1990) 13, 14, 15, 16
United States v. Suntar Roofing, Inc., 897 F.2d 469 (10th Cir. 1990) 10

CONSTITUTION AND STATUTES

U.S. Const. amend. XIV 18, 19
18 U.S.C. § 371 (1988) ..... *passim*

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the largest federation of businesses, companies, and associations in the world. With substantial membership in each of the fifty states, the Chamber represents more than 220,000 businesses and organizations and serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in critical issues before the Supreme Court of the United States, the lower courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. The Chamber also seeks to advance those interests by filing briefs in cases of importance to the business community.[1]

The judgment and opinion of the United States Court of Appeals for the Ninth Circuit has serious adverse implications for both large and small corporations alike. The decision below is of great concern to the Chamber's members in that it upholds the conviction of a corporation for criminal conspiracy based on the acts of one co-conspirator who, at the time the alleged acts were committed, was an employee of the company acting within the scope of his authority. Moreover, this individual employee was acquitted by a jury of conspiring with any other person. In the Chamber's view, it defies logic and ignores the well-established decisions of this Court that a corporation can be liable for criminal conspiracy with one of its own individual employees when, on the same evidence, that agent, who is an indispensable party to the conspiracy, is acquitted of entering into such a conspiracy.

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[1] Petitioner Hughes Aircraft Company and Respondent United States of America have consented to the filing of this amicus brief. Their respective letters of consent are filed herewith.

The appellate court's decision effectively allows the existence of a conspiracy between two persons, one natural and one fictitious, based on the innocent acts of the natural person which are then imputed to the corporation as conduct deemed to be conspiratorial. Such an unwarranted extension of corporate liability serves no useful purpose in deterring criminal confederation, which is one of the primary rationales for punishing conspiracy. Moreover, if any action taken by an individual acting for the benefit of the corporation, once imputed to the corporation, constitutes a conspiracy between the agent and the corporate entity, otherwise legitimate corporate decision-making and economic management necessary for the proper functioning of the business will be seriously chilled. This effect will be felt particularly hard by those members of the Chamber who are often small or very closely held companies who typically conduct their everyday business activities through one or very few natural persons. In that the decision below constitutes an unwarranted over-extension of the fiction of corporate personality, the Chamber thus believes that it will have substantial detrimental impact upon the business community in general.

Because the Chamber believes it is important for this Court to recognize the significance of this issue to the business community, and because the Ninth Circuit's interpretation and application of conspiracy law and the federal conspiracy statute at issue is in conflict with applicable decisions of this Court as well as other courts of appeal, the Court should grant the petition for writ of certiorari.

SUMMARY OF ARGUMENT

In the instant case, a corporation was found guilty of criminal conspiracy despite the fact that at the same trial no other natural person was found to have engaged in any substantive criminal or conspiratorial act whatsoever. Indeed, the Ninth Circuit upheld the conspiracy conviction of the company, despite the jury's acquittal of the one individual employee who was the "hub" and, therefore, the indispensable party to such a conspiracy.

Without the participation of at least two natural persons, there can be no conspiracy, much less one that can be attributed to a fictitious person such as a corporation. In that a corporation cannot itself participate in criminal activity, but only may be guilty of such conduct, if at all, through the imputed acts of its employees, the Ninth Circuit's opinion defies logic. Moreover, in applying the general rule that inconsistent jury verdicts against a single defendant are not grounds for reversal, the Ninth Circuit's decision ignores the clear precedent of this Court with respect to conspiracy cases, which require the interaction and, thus, the conviction, of at least two natural persons.

Because the appellate court's decision has defied logic and is in conflict with the well-settled and currently viable doctrines of this Court with regard to the conviction of but one co-conspirator, this is a case clearly requiring the exercise of the Court's power of supervision.

In addition, without the requisite number of persons necessary to communicate and independently reach an agreement, not only can there be no conspiracy, but none of the reasons for separately punishing and deterring criminal organization are present.

If permitted to stand, the ruling below will have a substantial detrimental impact on the Chamber's members, particularly those businesses which are small or closely held. If every action, statement or decision undertaken by an individual employee (without communication with

another natural person) theoretically could result in a conspiracy between the employee and the corporation, a company's ability to effectively manage its affairs will be seriously impaired. This is because meaningful consultation and discussion necessary for day-to-day operation and management of the business will be severely impeded. Moreover, the decision below disparately and unfairly treats those who have chosen to act through a corporate form as opposed to some other business device.

Because the Ninth Circuit's decision has significant adverse ramifications on the business community in this country and ignores the reality of the manner in which many small and closely held companies function, this Court should grant the petition for a writ of certiorari.

ARGUMENT

I. THE CONVICTION OF ONE CO-CONSPIRATOR DESPITE THE ACQUITTAL OF THE OTHER, WHO IS A NECESSARY PARTY TO SUCH CONSPIRACY, CANNOT BE UPHELD

A. The Acquittal of LaRue, an Indispensable Party to the Alleged Conspiracy, Precludes the Existence of a Conspiracy

The general federal conspiracy statute under which Hughes Aircraft Company, Inc. ("Hughes") and Donald LaRue ("LaRue") were charged, 18 U.S.C. § 371 (1988), requires the agreement of two or more persons to commit any offense against or to defraud the United States, and one or more of such persons to do any act to effect the object of the conspiracy.[2] The government alleged the existence of a "wheel" type of conspiracy with LaRue as the necessary "hub" or conduit and the four unindicted co-conspirators, who were similarly employed at Hughes, as the "spokes." However, no "rim"

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[2] The statute is reprinted in its entirety in the Appendix to Hughes' Petition for Writ of Certiorari (hereinafter referred to as "Pet. App.") filed with the Court in this matter on August 11, 1994. Pet. App. 2a n.1.

connecting the spokes was alleged to exist. As the district court noted in its Order Denying Motion for Judgment of Acquittal or New Trial, "[d]uring the trial, Hughes, the government and the Court agreed that Hughes could be guilty of conspiracy only if LaRue was found to have conspired with one of the four unindicted Hughes employees." Pet. App. 14a. The extent of Hughes' conspiracy liability, therefore, necessarily was consistent with that of LaRue, whose conduct was attributed to Hughes on the basis of *respondeat superior*.

Since a corporation, as a wholly fictitious person, is incapable of acting for itself, its conduct only may be imputed from the actions of natural persons acting on behalf of the corporation. *See Palazzo v. Gulf Oil Corp.*, 764 F.2d 1381, 1385 (11th Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986) ("[t]he rule is well established that a corporation is an artificial entity that can act only through agents . . . ."). Accordingly, the jury was instructed that for Hughes to be found guilty of conspiracy, such a conspiracy would have to consist of "LaRue, and at least one of the unindicted co-conspirators." Pet. App. 31a. The conspiracy thus alleged by the government was required to include more than one natural person, *i.e.*, LaRue and at least one of the four unindicted employees. LaRue was the hub or common denominator through which the conspiracy operated with the unindicted co-conspirators. Despite the charge to the jury and the "paucity of evidence at trial supporting any other theory of Hughes' culpability," the jury acquitted LaRue of all criminal charges, but somehow convicted Hughes of conspiracy. Pet. App. 14a.

What this case thus presents is not merely a "stark inconsistency," but rather an impossibility. *See* Pet. App. 28a. Any such conspiracy was required to involve, at a minimum, LaRue; that is, the government did not attempt to prove that any other set of two (not including LaRue) conspired. The Ninth Circuit attempted to circumvent

this requirement by determining that "the jury could have found Hughes guilty based on the actions or omissions of its supervisors and employees other than LaRue." *United States v. Hughes Aircraft Co.*, 20 F.3d 974, 978 (9th Cir. 1994). Such a finding, having no factual support in the record, is plainly wrong and, in fact, ignores the trial court's instructions on this point which were repeated on three separate occasions. Moreover, the district court specifically found that "[d]uring the trial, Hughes, the government and the Court agreed that Hughes could be guilty of conspiracy *only if LaRue was found to have conspired* with one of the four unindicted Hughes employees. . . . The jury was so instructed." Pet. App. 14a (emphasis added).[3] Finally, the district court also noted that the government presented no evidence that would sustain Hughes' conspiracy conviction on any other theory.[4] *Id.*

There exist two fatal flaws in the Ninth Circuit's determination. First, it is axiomatic that "factfinding is the basic responsibility of district courts, rather than appellate courts." *Pullman-Standard v. Swint,* 456 U.S. 273, 291 (1982) (quoting *DeMarco v. United States,* 415 U.S. 449, 450 n. (1974)). As this Court frequently has held, "appellate courts are not to decide factual questions *de novo,* reversing any findings they would have made differently." *Maine v. Taylor,* 477 U.S. 131, 145 (1986) (citations omitted). Rather, the district court's findings of fact are reviewed for clear error. *United States v.*

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[3] This point was underscored by the district court which noted during its review of the proposed jury instructions that "[t]he government, I assume, would agree that if LaRue is not a co-conspirator, there isn't any conspiracy, I mean under the facts of the case." Appendix ("App.") 2a.

[4] Again, the district court recognized this point during its review of the jury instructions, chiding the government that "if you think the jury can find a conspiracy between [some of the unindicted co-conspirators], then I sure want to know about it because I don't think it could possibly stand and I don't think you think it could stand." App. 2a.

Lopez, 989 F.2d 1032, 1036 (9th Cir. 1993), and such findings will be adjudged clearly erroneous only when the reviewing court is left with the definite and firm conviction that, on the entire evidence, a mistake has been committed. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985) (citation omitted).

In its opinion below, the Ninth Circuit did not apply the *de novo* standard of review, nor did it merely apply the clearly erroneous standard incorrectly. Amazingly, it undertook *absolutely no analysis* of the district court's findings on this point. Rather, it assumed critical facts, not only in complete ignorance of the record below, but in stark contradiction to the trial court's findings. Indeed, the Ninth Circuit offered not one citation to the record for its conclusion that the jury could have convicted Hughes of conspiracy based on the conduct of its employees other than LaRue. *See Hughes*, 20 F.3d at 978. Clearly, this is because no support, in fact, exists in the record to support such a determination. The Ninth Circuit's complete disregard for the deference accorded the trial judge with regard to such factual questions ignores the mandates of this Court as well as its own and, as such, cannot be sustained. *Taylor*, 477 U.S. at 145; *see also Lopez*, 989 F.2d at 1036.

In addition, as this Court has made clear, courts are not free to speculate on the theories by which juries reach their verdicts. *See City of Los Angeles v. Heller*, 475 U.S. 796, 798 (1986) (per curiam). Rather, juries are presumed to act in accordance with the instructions given them, and not to consider and base their decisions on legal questions with respect to which they are not charged. *Id.* at 798 (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604 (1985)). Thus, jury verdicts may be upheld only on theories actually presented to the jury, and an appellate court's "search for ambiguity in the verdict [will be] unavailing." *Id.*

In the decision below, the Ninth Circuit's *post hoc* rationalization that there exists some theory in support of

the jury's verdict cannot stand because it simply was not presented to the jury. The jury was instructed that Hughes could only be liable through the acts of LaRue, and then only if LaRue conspired with any one of up to four other Hughes employees. Pet. App. 31a. Thus, for Hughes to be convicted, the jury was required to find at least one conspiracy involving LaRue. Because the jury failed to satisfy such a prerequisite for Hughes' culpability, by finding LaRue not guilty, the jury's verdict cannot be upheld. The Ninth Circuit's abject speculation as to possible rationales by which the jury could convict Hughes while acquitting LaRue, in direct contradiction to the record below, is prohibited. *See Heller,* 475 U.S. at 798. This is because the trial court, which is uniquely qualified to make such factual determinations, allowed no such theory under which Hughes could have been convicted to be presented to the jury. *See Taylor,* 477 U.S. at 145; *Heller,* 475 U.S. at 798.

Because the district court found that the evidence adduced at trial was legally insufficient to support such an instruction, in that the conspiracy presented at trial could only implicate the unindicted co-conspirators with and through the participation of LaRue, the jury could not have found Hughes guilty based solely on the acts of the other Hughes employees. Since LaRue was acquitted of engaging in conspiratorial conduct, on the evidence presented and the jury instructions given, no conspiracy could have existed and, thus, none could be attributed to Hughes. Therefore, the jury's conviction of Hughes cannot be upheld. *See Heller,* 475 U.S. at 798.

B. The General Rule Upholding Inconsistent Verdicts as to Individual Defendants Is Not Applicable to Conspiracy Cases

There is a logical distinction between criminal conduct by two or more persons which can take place "in parallel" (that is, without requiring personal interaction) and criminal conduct which, to have taken place at all, *must* embody the interaction of two or more natural persons.

This Court has long recognized a distinction between the situation in which an individual defendant receives inconsistent verdicts on multiple counts and the situation in which all alleged co-conspirators but one are acquitted. *Dunn v. United States,* 284 U.S. 390 (1932), established the general principle that inconsistency between verdicts does not generally constitute valid grounds for the reversal of an individual's conviction. *See id.* at 393. However, in *Hartzel v. United States,* 322 U.S. 680 (1944), this Court reaffirmed the established common law rule that a conspiracy cannot be held to exist if all alleged co-conspirators but one are acquitted. *Id.* at 682 n.3. Thus, the *Hartzel* Court held that where only one of three alleged co-conspirators was convicted, it was "impossible to sustain [his] conviction upon . . . the conspiracy count." *Id.*

Both the general rule of upholding inconsistent verdicts and the "rule of consistency" in conspiracy law have coexisted as two separate and distinct lines of cases in the Supreme Court. Indeed, in *Harris v. Rivera,* 454 U.S. 339 (1981) (per curiam), the only Supreme Court case which addresses both *Dunn* and *Hartzel,* this Court recognized the distinction. In *Harris,* which addressed inconsistent verdicts (not relating to conspiracy) against multiple defendants, the Court explicitly contrasted *Hartzel*'s rule of consistency holding that the conviction of but one co-conspirator is "impossible to sustain" with the *Dunn* rule that for individual defendants "[i]nconsistency in a verdict is not a sufficient reason for setting it aside." *Id.* at 345 & n.13 (citing *Dunn,* 284 U.S. at 393; *Hartzel,* 322 U.S. at 682 n.3). Nevertheless, in its decision below, the Ninth Circuit inexplicably determined that the *Dunn* rule (expanded upon by *United States v. Powell,* 469 U.S. 57 (1984)) applicable to individual defendants encompasses and, therefore, overrules the rule of consistency in conspiracy cases.[5]

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[5] To read *Dunn* and *Powell* as rejecting the rule of consistency in conspiracy cases clearly established by this Court in *Hartzel*

The Ninth Circuit's holding is particularly puzzling in light of this Court's decision in *Powell*, which essentially employed an analysis as to which party derives the benefits and which party suffers the burdens of verdict inconsistency to explain why an individual defendant who had received inconsistent verdicts on multiple counts would not be permitted to invalidate his conviction. *See id.* at 65-69. *Powell* does not address *Hartzel* or any of this Court's conspiracy rule of consistency cases, and its rationale does not extend to the criminal conspiracy situation presented here. *See United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 475 & n.3 (10th Cir. 1990).

Powell's core holding is its analysis of the three possible reasons for verdict inconsistency, *i.e.*, jury lenience, a mistaken acquittal or a mistaken conviction, and which party derives the benefits and/or suffers the burdens thereof. *See Powell* at 65-69. Leniency obviously results in a benefit to the defendant and a burden to the government, as does a mistaken acquittal. The only possibility which benefits the government is a mistaken conviction. *See id.* at 65, 68. Unlike the government, which cannot appeal an acquittal, the defendant may still seek to set aside the conviction, but verdict inconsistency may not be the basis therefor. *See id.* at 67. However, "a criminal defendant already is afforded protection against jury irra-

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would require one to interpret *Hartzel* as overruling *Dunn*, in part by implication, and *Powell* later overruling *Hartzel* by implication. Such speculation as to whether a Supreme Court decision remains good law is strongly disfavored, however, and should be avoided. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam) ("only this Court may overrule one of its precedents"). In fact, the Tenth Circuit specifically found that *Powell* did not abrogate the rule of consistency in that *Powell* neither discussed nor expressly overturned *Hartzel*. *See United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 475 & n.3 (10th Cir. 1990). It thus follows that *Hartzel* remains good law, which the lower courts are bound to uphold. *See United States v. Kismetoglu*, 476 F.2d 269, 270 (9th Cir.) (per curiam), *cert. dismissed*, 410 U.S. 976 (1973) ("[w]e are bound to follow the opinion of the Supreme Court").

tionality or error by the independent review of the sufficiency of the evidence. . . ." *Id.* None of the rationales supporting *Powell*'s benefit/burden analysis, however, apply to the conspiracy presented in the instant case. This is because Hughes receives no benefit if LaRue's acquittal was based on leniency or mistake. Indeed, Hughes is burdened by LaRue's acquittal almost as much as the government, primarily because LaRue obviously will not appeal such an acquittal. Thus, the effect on Hughes of the Ninth Circuit's decision is that LaRue's acquittal is functionally equivalent to a non-appealable determination of LaRue's guilt—guilt which is then imputed to Hughes.[6]

Finally, Hughes would be similarly burdened if its conviction, rather than LaRue's acquittal, was the result of jury error. Thus, *Powell*'s analysis of which party receives the benefits and the burdens of an inconsistent jury verdict, as well as the rationale therefor, simply does not apply to the conspiracy rule of consistency situation raised below. There is no scenario under which Hughes could have benefited from LaRue's acquittal, and, in fact, a high probability that Hughes actually was harmed by it.[7]

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[6] Although Hughes theoretically still has the recourse of a sufficiency of evidence review of its conviction, the Ninth Circuit determined only that the jury could have found Hughes guilty on the basis of evidence presented against Hughes and not LaRue. *See Hughes*, 20 F.3d at 978. It did not find the evidence against LaRue sufficient; nor would one ever expect a very diligent review of the evidence presented against an acquitted defendant. Therefore, although available in theory to the sole convicted co-conspirator, the "protection against jury irrationality or error by the independent review of the sufficiency of the evidence" underpinning this court's holding in *Powell*, is not available in reality. *See Powell*, 469 U.S. at 67.

[7] Moreover, where the conduct of one co-conspirator actually must be imputed to the other co-conspirator for the other to be guilty of consipracy, there simply is no way to treat the acquittal of one co-conspirator as *Powell* treats single defendant acquittals, *i.e.*, by acting as if the charges were never brought. *See Powell*,

Therefore, the rule of consistency, because of the unique requirement that there be a plurality of actors to constitute a conspiracy, is not an *exception* to the general rule established by this Court insulating inconsistent jury verdicts from review. Rather, both rules are separate, distinct and currently viable legal doctrines in this Court; however, the rule established in *Dunn* and *Powell* upholding inconsistent verdicts rendered against a single defendant is not applicable to conspiracy. Furthermore, in that Hughes' sole co-conspirator, whose individual conduct also was imputed to Hughes, was acquitted of engaging in substantive criminal or conspiratorial acts, Hughes' conviction for conspiracy is not merely inconsistent, but rather, is "impossible to sustain." *See Hartzel*, 322 U.S. at 682 n.3.

Inconsistent jury verdicts, while permissible where individual defendants act in parallel to commit a crime, cannot be upheld where *interaction* among such individuals is required for there to have been a crime in the first place. As with the conspiracy present here, in that LaRue did not conspire with the other Hughes employees, and the employees could not have conspired with each other, the requisite interaction is not present, such that the inconsistent treatment of Hughes cannot be permitted to stand.

II. WITHOUT THE PARTICIPATION OF LARUE, THE CONSPIRACY OF WHICH HUGHES WAS CONVICTED COULD ONLY CONSIST OF ONE EMPLOYEE AND, THUS, CANNOT BE UPHELD

The government alleged the existence of up to four separate two-person conspiracies, each of which involved LaRue. That is, the indictment did *not* charge any conspiratorial conduct *among* the other four. The trial

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469 U.S. at 65-69. This is because if LaRue's acquittal is treated as though he had not been charged with conspiracy, under the government's theory of the case, then Hughes could not have been charged with conspiracy in the first place, much less convicted thereof.

court's instructions confirmed that LaRue was a necessary party to any such agreement(s). Pet. App. 14a, 31a. The jury, by acquitting LaRue of conspiracy, thus deprived each of the alleged conspiracies of an essential member. What therefore remains is that Hughes' liability is predicated on the acts of one or more natural persons who, as a matter of law, did not interact either with LaRue or with each other. Such conduct, absent illegal interaction with any other natural person, stands alone, yet when imputed to the company is deemed conspiratorial.

In essence, each of the four possible conspiratorial relationships for which Hughes could have been convicted may be based *only* upon the conduct of one of the unindicted, individual employees, acting in relationship to LaRue and on behalf of Hughes, whose actions are then attributed to the company in order to establish the plurality of actors necessary to form a conspiracy. Although the Ninth Circuit in the decision below noted that "[a] conspiracy arises when more than one [meaning, of course, two or more natural persons] of [a corporation's] employees agree to defraud the government," *Hughes*, 20 F.3d at 980, by upholding Hughes' conviction, the court implicitly has determined that a corporation may be guilty of conspiracy based on the acts of, at most, one of its employees. *See id.* This postulation is, in a sense, oxymoronic because it presumptively assumes that only one person is necessary for a conspiracy, thus, omitting the "communication" which is the *sine qua non* of a conspiracy.

Several circuits have declared that a corporation can be convicted of conspiracy under 18 U.S.C. § 371 for the acts of at least two of its individual employees.[8] How-

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[8] *See, e.g., United States v. Ames Sintering Co.*, 927 F.2d 232, 236-37 (6th Cir. 1990) (per curiam); *United States v. Stevens*, 909 F.2d 431, 432 (11th Cir. 1990); *United States v. S & Vee Cartage Co.*, 704 F.2d 914, 920 (6th Cir.), *cert. denied*, 464 U.S. 935 (1983); *United States v. Hartley*, 678 F.2d 961, 972 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *but see United States v. Notarantonio*, 758 F.2d 777, 789-90 (1st Cir. 1985).

ever, no lower court has yet held that a corporation can be convicted of criminal conspiracy pursuant to 18 U.S.C. § 371 based on the acts of one employee, whose conduct is then imputed to the company on the basis of *respondeat superior*, in order to establish the requisite plurality of actors necessary to form a conspiracy. *See United States v. Stevens*, 909 F.2d 431, 432-33 (11th Cir. 1990) (in that there is a lack of creative interaction between two autonomous and independent actors, "[t]he argument that a single human actor can be convicted of conspiracy under § 371 . . . flies in the face of the traditional justification for criminal conspiracies")[9]

As the district court set forth in its instructions to the jury, a corporation cannot act for itself. Pet. App. 30a. Since a corporation cannot itself commit criminal acts, it is never an *actual participant* in any crime; rather it participates, if at all, through its employees and agents. *See Stevens*, 909 F.2d at 432-33; *Palazzo*, 764 F.2d at 1385; *United States v. Carroll*, 144 F. Supp. 939, 942 (S.D.N.Y. 1956), *aff'd sub nom. United States v. Sheba Bracelets, Inc.*, 248 F.2d 134 (2d Cir.), *cert. denied*, 355 U.S. 904 (1957). Corporate liability, therefore, is vicarious in that it is premised on the actions of its officers, agents and employees which are imputed to the corporation. It is these individuals, therefore, who must interact in order to reach an agreement that may be deemed conspiratorial.

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[9] *See also United States v. Carroll*, 144 F. Supp. 939, 942 (S.D.N.Y. 1956), *aff'd sub nom. United States v. Sheba Bracelets, Inc.*, 248 F.2d 134 (2d Cir.), *cert. denied*, 355 U.S. 904 (1957) (where the government failed to prove a conspiracy among several individuals, "it seeks to accomplish the same purpose of breathing life and purpose, and thereby creating the requisite independent personality, into an institution manipulated solely by the individual from whom independence is required for criminality. This, the prosecution cannot do and it must fail on this count."). The First Circuit has reached a similar conclusion, albeit in dictum, noting that "[a] corporate officer, acting *alone* on behalf of the corporation, could not be convicted of conspiring with the corporation." *United States v. Peters*, 732 F.2d 1004, 1008 n.6 (1st Cir. 1984) (citation omitted).

The Ninth Circuit's decision, in essence, permits the existence of a conspiracy consisting solely of one natural person (an individual employee) acting in concert with no other natural person to benefit the company. That is, *none* of the four unindicted Hughes employees, who could not have conspired with any Hughes employee other than LaRue and who did not conspire with LaRue, could have interacted with any other "person" except the corporate entity. *See* Pet. App. 31a. Such "interaction" is impossible in that a corporation, as a wholly fictitious person, is itself incapable of acting or interacting and, thus, it cannot be one of the actors necessary to form a conspiracy. Absent the requisite number of independent persons necessary to form an agreement, no conspiracy exists for which Hughes can be liable.[10] *See Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975) ("[t]he essence of the crime of conspiracy is agreement").

The decision below, however, has ramifications far beyond the interests of the parties themselves. The Ninth Circuit's upholding of Hughes' conviction also will have a profound effect on the Chamber's constituents, many of whom are small or closely held corporations. Many of these companies consist of one or very few individuals charged with day-to-day management and operation of the business. The Ninth Circuit's ruling raises the specter that every decision of an individual officer, agent or employee, if undertaken within the scope of his/her duties, once imputed to the corporation, conceivably could be deemed an agreement necessary to form a conspiracy with the company when there is not a second natural person involved.

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[10] Although it has been posited that a natural person can decide as an individual to pursue an illegal course of conduct and at the same time make up the "mind" of the corporation for whom he acts, courts have rejected this theory because it lacks the necessary "interaction between multiple autonomous actors." *Stevens*, 909 F.2d at 434; *see Carroll*, 144 F. Supp. at 942 ("the traditional understanding of the term conspiracy repels such a notion").

Such a broad interpretation of the general federal conspiracy statute is a clear over-extension of the fiction of the corporate personality. *See Stevens,* 909 F.2d at 433 n.8 (citing *Carroll,* 144 F. Supp. at 941) (other citations omitted). Since none of the traditional reasons for separately punishing conspiracy are present in a small or closely held company there exists little, if any, additional deterrent effect of subjecting the corporation to potential conspiracy liability. Both the company and the individual officers and employees still may be liable for the underlying substantive criminal offense(s). Moreover, since a small company cannot simply change its corporate structure, *i.e.,* decision-making still must be performed by one or few persons, it is grossly unfair to mete out more severe punishment just because the crime was committed through a corporate form as opposed to some other business device. *See Carroll,* 144 F. Supp. at 942; *see also Nelson Radio & Supply Co. v. Motorola, Inc.,* 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied,* 345 U.S. 925 (1953) (a corporation does not engage in conspiracy when it carries out managerial policy through its officers and agents, "which is the only medium through which it can possibly act").

Another consequence of the decision below which is of great concern to the Chamber's members, both large and small, is the effect it will have on a company's ability to effectively manage its operations. If, as the Ninth Circuit believes, practically any individual action taken within the corporate framework ultimately can result in a conspiracy by imputing such conduct to the corporation in order to form a plurality, then meaningful consultation and discussion necessary for economic management of the business will be severely chilled. *See, e.g., Nelson Radio,* 200 F.2d at 914 (in an antitrust context, communication among those engaged in management and day-to-day operation of the company does not result in the company being engaged in an unlawful conspiracy).

This is particularly troublesome in the present situation where Hughes was in the business of manufacturing components for use in connection with government contracts. Government procurement statutes and regulations are among the most complex ever devised. *See United States v. General Dynamics Corp.*, 644 F. Supp. 1497, 1499, 1504 (C.D. Cal. 1986), *rev'd on other grounds*, 828 F.2d 1356 (9th Cir. 1987) (noting that the webs of government procurement laws, regulations and directives are so "arcane," they "almost defy understanding"). Such requirements routinely are subject to widely ranging interpretations.

Thus, frank discussion is both inevitable and necessary within the corporate structure to ensure such regulations are implemented properly and, simply to sort out what is legal from what is not. It is precisely this type of situation, involving the origination and interpretation of complex rules and regulations, in which open discussion is absolutely critical in order to chart an appropriate course of corporate conduct. The effect of the ruling below would be to severely discourage such necessary intracorporate communication for fear of being deemed conspiratorial. By essentially promoting silence, the Ninth Circuit's decision actually will serve to counteract the very intent of the myriad of government procurement regulations—which is to benefit the United States. *See General Dynamics*, 644 F. Supp. at 1504 (government regulation of the defense industry is "designed to assure the ultimate protection of the national interests, both technologically and economically"). More importantly, however, by contributing to the prevention of efficient and proper conduct of corporate affairs by discouraging necessary communication, the Ninth Circuit's decision constitutes an impermissible overextension of the conspiracy statute at issue to reach standalone conduct of individual employees. *See Carroll*, 144 F. Supp. at 941.

Of additional concern to the Chamber's members who are small or closely held, is that if the illegal conduct of

an individual employee then can be imputed to the corporation to form a conspiracy, the underlying substantive criminal offense is, in effect, being combined with the conspiracy. This is because there is no practical way to separate or project the elements of the conspiracy offense from the elements of the predicate offense. If these requirements simply can be attributed to a fictitious person based solely on the acts of one natural person, then the government, in essence, is relieved of its constitutional requirement to prove beyond a reasonable doubt the existence of an agreement between two or more persons.[11] *See United States v. Mancillas*, 580 F.2d 1301, 1307 (7th Cir.), *cert. denied*, 439 U.S. 958 (1978) (because "conspiracy requires a concert of action between two or more persons for a common purpose," the government must prove beyond a reasonable doubt that at least two people entered into an agreement).

Because the inchoate crime of conspiracy is separate and independent of the underlying substantive offense, distinct elements of proof are required to establish the existence of an agreement between a plurality of actors. *See Iannelli*, 420 U.S. at 785 n.17 (in that conspiracy and substantive offenses essentially are different, proof of each necessarily requires proof of facts not necessary to convict for the other). The ruling below thus impermissibly allows the government to circumvent its constitutionally mandated burden to prove beyond a reasonable doubt the existence of each element necessary to establish a criminal conspiracy. *See Francis v. Franklin*, 471 U.S. 307, 313 (1985); *Iannelli*, 420 U.S. at 785 n.17.

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[11] The due process clause of the Fourteenth Amendment to the Constitution protects against conviction of an accused except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *Francis v. Franklin*, 471 U.S. 307, 313 (1985). In a criminal prosecution, therefore, the government bears the burden of proving beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged. *In re Winship*, 397 U.S. 358, 364 (1970); *Davis v. United States*, 160 U.S. 469, 487 (1895).

The Ninth Circuit's decision essentially permits a corporation to be convicted of conspiracy based on the conduct of one natural person acting on behalf of the corporation, yet interacting with no other natural person. Such a ruling is in direct conflict with the decisions of other circuits who have reached this question. Moreover, it ignores the well-established reasons for separately punishing and deterring conspiracy.

However, even more important to the Chamber is the significant detrimental effect the decision below will have on the business community. By conceivably elevating every individual act or omission to the level of conspiring with the corporation, the appellate court has illogically over-extended the boundaries of the corporate fiction. Not only does there exist no reason for such an extension, but the decision unfairly penalizes corporations and will act to discourage meaningful consultation within the corporate structure—discussion necessary for the sound management and operation of the company.

Finally, the Ninth Circuit's ruling, by dispensing with the requirement that a plurality of actors reach an agreement to do an illegal act, effectively combines the underlying substantive offense with the conspiracy offense. This allows the government to circumvent its burden to prove beyond a reasonable doubt that each element of the separate conspiracy charge, in fact, occurred. Such a result cannot be squared with the decisions of this Court and the circuit courts of appeal, as well as the Fourteenth Amendment to the Constitution and, as such, cannot be upheld.

CONCLUSION

For the reasons stated above, the Chamber of Commerce of the United States of America respectfully requests the Court to grant the petition for writ of certiorari.

Respectfully submitted,

Of Counsel:

ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

HERBERT L. FENSTER
Counsel of Record
ANDREW N. PETRAKES
MCKENNA & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500
Attorneys for Amicus Curiae
The Chamber of Commerce of
the United States of America

Dated: October 12, 1994

APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Criminal No. 91-1022-WMB

UNITED STATES OF AMERICA,
Plaintiff,

v.

HUGHES AIRCRAFT CO., INC. and
DONALD ANTHONY LARUE,
Defendants.

EXCERPT OF REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Los Angeles, California
Tuesday, June 9, 1992

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* * * *

[68] MR. SANDERS: But on the other hand, harkening back to our intra co-conspiracy notion, if the jury should find it was LaRue and Hughes, then there would be no conspiracy.

THE COURT: It can't be LaRue and Hughes here.

MR. SANDERS: Maybe I'm misunderstanding how you are saying it then.

MR. PAPELIAN: I thought the Court indicated that LaRue was part of the individuals at Hughes.

MR. SANDERS: Your Honor, could you repeat the second element again?

THE COURT: Yes. Let me just—you might have a point. Let me see if I can change it.

The government, I assume, would agree that if LaRue is not a co-conspirator, there isn't any conspiracy, I mean under the facts of the case.

MR. NEWHOUSE: Well—

THE COURT: I mean you have got to be dying for a conviction if you want one on Goodearl and Ibarra, or [69] something like that, or Tolby.

If LaRue isn't there—

MR. NEWHOUSE: I think it is unlikely, but I think the evidence would support a conviction—

THE COURT: Well then, I want special interrogatories and I want them prepared by the government because if it's going to be, if you think the jury can find a conspiracy between Goodearl and Tolby, then I sure want to know about it because I don't think it could possibly stand and I don't think you think it could stand.

MR. NEWHOUSE: Well, your Honor, we would prefer the Court's wrong. We have—I don't know. I wouldn't know how to draft a special interrogatory.

THE COURT: Well, I mean I can draft it. My court reporter is looking at me because she hears me, case after case, swear that I am not going to do the jury instructions and special interrogatories for the lawyers any more and I end up doing them.

It would have to be LaRue and at least one of the unindicted co-conspirators.

MR. SANDERS: That's what it has to be.

MR. NEWHOUSE: All right.

(Pause in the proceedings.)

THE COURT: Okay. Any objection to that form?

MR. NEWHOUSE: No, your Honor.

* * * *

SUPREME COURT, U.S.
FILED
OCT 19 1994
CLERK

No. 94-262

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HUGHES AIRCRAFT COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

JOHN J. HIGGINS
HUGHES AIRCRAFT COMPANY, INC.
7200 Hughes Terrace
P.O. Box 80028
Los Angeles, CA 90090

KENNETH W. STARR
Counsel of Record
CHRISTOPHER LANDAU
KIRKLAND & ELLIS
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-5000

JOSEPH E. PAPELIAN
GENERAL MOTORS CORP.
3031 West Grand Boulevard
P.O. Box 33122
Detroit, Michigan 48232

Dated: October 19, 1994

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-3478208

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TABLE OF AUTHORITIES

Cases — Page

Apodaca v. United States,
188 F.2d 932 (10th Cir. 1951) 8
Brown v. Board of Education,
347 U.S. 483 (1954) 7
Dunn v. United States,
284 U.S. 390 (1932) 7, 8
Harris v. Rivera,
454 U.S. 339 (1981) *(per curiam)* 7
Harrison v. United States,
7 F.2d 259 (2d Cir. 1925) 7
Mininsohn v. United States,
101 F.2d 477 (3d Cir. 1939) 3
Morissette v. United States,
342 U.S. 246 (1952) 5
Plessy v. Ferguson,
63 U.S. 537 (1896) 7
United States v. American Grain & Related Inds.,
763 F.2d 312 (8th Cir. 1985) 6
United States v. Hugh Chalmers Chevrolet-Toyota, Inc.,
800 F.2d 737 (8th Cir. 1986) 5
United States v. Mahar,
801 F.2d 1477 (6th Cir. 1986) 6
United States v. Notarantonio,
758 F.2d 777 (1st Cir. 1985) 6
United States v. Peters,
732 F.2d 1004 (1st Cir. 1984) 6
United States v. Powell,
469 U.S. 57 (1984) 7, 8
United States v. Williams,
503 F.2d 50 (6th Cir. 1974) 8

Statutes

15 U.S.C. § 714m(d) 6
15 U.S.C. § 1986 5
18 U.S.C. § 371 . . . . . *passim*
21 U.S.C. § 846 6
42 U.S.C. § 1985 6

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REPLY BRIEF OF PETITIONER

The Government's Opposition seeks to portray this case as a quirky anomaly that does not necessarily implicate the several circuit splits outlined in Hughes' petition. The Court need not review the intracorporate conspiracy issue, the Government asserts, because there is as yet no *direct* split under this *particular* conspiracy statute. And there is no need to review the inconsistent verdict issue, the Government then maintains, because the direct split that *does* exist on that particular issue may yet go away. But these gossamer—not to mention inconsistent—distinctions cannot obscure the basic fact that both issues involve significant legal questions that have long bedeviled the lower courts and were incorrectly resolved below. This case extends vicarious criminal liability beyond all bounds of law and logic, holding a corporation liable for

conspiracy based entirely on the conduct of its own employees—indeed, based entirely on the conduct of a single *acquitted* employee.

1. The Government's arguments on the intracorporate conspiracy issue are based on a flawed premise: that the question here is whether to "engraf[t] an intra-corporate *exception* onto the broad language of Section 371." Opp. at 9 (emphasis added). That premise, of course, begs the real question: just how "broad" *is* the reach of § 371? Until that question is answered, there is no reason to address any possible "exception" to the statute's coverage. The Government's arguments here fail not because of any intracorporate *exception* to conspiracy law, but for the simple reason that conspiracy law does not in the first instance extend as far as the Government would like.

The Government first defends its interpretation of the statute on "plain language" grounds. Because § 371 refers to "two or more persons" and two or more Hughes employees were alleged to have conspired, the Government asserts, the statute's "plurality" requirement is satisfied. Opp. at 5-6. As Hughes noted in its petition, however, Pet. at 5-6, the question is not whether "two or more persons" can be convicted of conspiracy, but rather whether *a single legal entity* can be convicted of conspiracy based solely on the conduct of two or more of its members. And on this question, the language of § 371 in no way supports the Government. Indeed, to the extent the language of § 371 is "plain," it supports Hughes. The statute refers not only to "two or more persons," but to "each" of them, and a single entity cannot logically be both "two or more persons" and "each" of those persons at once. Notwithstanding its insistence that the language is "plain," the

Government fails to mention, much less address, this textual point.[1]

The Government next challenges Hughes' interpretation of the common law of conspiracy, but again succumbs to the temptation to substitute conclusion for reasoning. Opp. at 6-7. The common-law crime's "plurality" requirement, the Government asserts, is satisfied by the participation of two or more natural persons, and Hughes "has not pointed to any common law support for its argument" to the contrary. *Id.* A quick scan of pages 7-9 of Hughes' petition, however, readily refutes both assertions—the common law has long recognized that (1) a single legal entity made up of multiple natural persons cannot be convicted of conspiracy among such persons, and (2) corporations are indivisible legal entities. The cases cited by the Government in support of its position are of recent vintage and base their conclusions—to the extent they pause to provide any reasoning at all—on policy grounds.[2]

Finally, the Government brandishes that ultimate weapon of interpretive desperation, the statute's "purpose."

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[1] The Government inexplicably contends in a passing footnote that Hughes' liability "did not rest on a *finding* that the corporation stood in the shoes of 'each' co-conspirator." Opp. at 6 n.2 (emphasis added). That is true, but irrelevant—Hughes should never have been indicted on the basis of an entirely intracorporate conspiracy in the first place. There has never been any contention in this litigation that any of the alleged co-conspirators acted other than in the corporation's interests. Indeed, the jury was instructed that in order to convict Hughes of conspiracy, the corporation must have "*act[ed] through* LaRue, *and* at least one of the unindicted co-conspirators, namely, James Temple, Frank Saia, Margaret Goodearl and/or Marion Tolby." App. 31a (emphasis added). Both the District Court and the Ninth Circuit squarely rejected Hughes' intracorporate conspiracy argument on the merits, not on the absence of any specific jury "finding"—which in any event the Government never requested— about the basis of Hughes' vicarious liability.

[2] The sole case cited by the Government with any conceivable claim to a historical pedigree, *Mininsohn v. United States*, 101 F.2d 477, 478 (3d Cir. 1939), does not—as the Government acknowledges, Opp. at 7—discuss this issue, and its silence can hardly be regarded as authoritative.

Echoing the court below, the Government contends that if a court were to "appl[y] the intracorporate conspiracy doctrine to this case, *no* corporation acting on its own behalf by and through its employees could be found guilty of conspiracy." Opp. at 9 n.3 (quoting App. at 8a-9a; emphasis added). As an initial matter, of course, invocation of "purpose" is unseemly and unhelpful in construing criminal statutes. The "purpose" of *any* criminal statute can invariably be said to be furthered by its broadest possible interpretation, since that would presumably give the Government the broadest possible leeway to ferret out wrongdoing. But our legal tradition establishes precisely the opposite interpretive rule: criminal laws are, if anything, to be construed narrowly, with ambiguities to be resolved in a defendant's favor. The Government's invocation of "purpose," if taken seriously, would wipe the rule of lenity off the books.

At any rate, the Government's dire predictions about the policy consequences of Hughes' position are entirely baseless. Like the Court below, the Government asserts that Hughes' interpretation of § 371 would "*shield* a corporation or its agents from criminal liability where its agents acted on its behalf." Opp. 6 (emphasis in original; internal quotation omitted). But that is wrong—as the Government itself notes, Hughes in no way challenges the traditional rule that a corporation may be convicted of conspiracy based on its agents' conduct *as long as at least one co-conspirator was outside the corporation*. Opp. at 5 (citing Pet. at 9). Hughes' point is a narrow one: based on the text and history of § 371, a corporation cannot be convicted of conspiracy based *solely* on the conduct of its own employees acting on its behalf. That does not "shield" the corporation from liability any more than the "overt act" requirement of conspiracy law might be said to "shield" a putative conspirator who committed no such act, or the requirement of proximate causation might be said to "shield" an alleged tortfeasor who contributed only remotely to an injury. The conspiracy statute, like other laws, simply has its limits, pesky as those might seem to a zealous prosecutor.

The Government fares little better in its attempt to distinguish away the welter of circuit splits involving the intracorporate conspiracy issue. The Government cannot, and does not, deny the confusion in this area. Opp. at 9-11 & nn. 4, 5. Rather, the Government seeks to avoid review in this particular case by slicing the issue into fine slivers, and then, one by one, distinguishing the other slivers from this one. While determining the appropriate level of generality at which a legal question is best framed is hardly an exact science, the Government simply goes too far in its attempt to narrow the issue presented here.

Because this case arises under § 371, the Government contends, its resolution would "she[d] little light" on the proper interpretation of *other* federal conspiracy provisions. Opp. at 11. But even a moment's reflection reveals the fallacy of that reductionistic approach. The U.S. Code contains over 300 separate provisions proscribing—but not defining—"conspiracy." It is silly to think that Congress intended each one of these provisions to be interpreted independently and abstractly. To the contrary, whenever Congress adopts a venerable term like "conspiracy," it presumptively incorporates settled legal antecedents. *See, e.g., Morissette v. United States*, 342 U.S. 246, 263 (1952). There must, in other words, be some background norm governing the interpretation of "conspiracy" absent a specific indication to the contrary.

Section § 371 is the fountainhead of American conspiracy law: it is the basic conspiracy provision in the federal criminal code, and employs boilerplate language tracked by most other conspiracy provisions. If there is *any* provision in the U.S. Code that might be deemed to set forth a background rule, § 371 is it. That is why, as the Government notes, it is to § 371 that courts have long turned for guidance when construing the conspiracy provisions of various other statutes, like the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 1986, *see United States v. Hugh Chalmers*

Chevrolet-Toyota, Inc., 800 F.2d 737, 738 (8th Cir. 1986), the Commodity Credit Corporation Charter Act, 15 U.S.C. § 714m(d), *see United States v. American Grain & Related Inds.*, 763 F.2d 312, 320 (8th Cir. 1985), and the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 846, *see United States v. Mahar*, 801 F.2d 1477, 1488 & n.19 (6th Cir. 1986). Obviously, at some level every conspiracy provision can be distinguished from every other provision, just as every person can be distinguished from every other person—but the question always is whether an asserted distinction makes a difference.

The court below invoked a civil/criminal distinction to distinguish a contrary line of conspiracy cases, but then perversely gave the criminal provision a *more expansive* scope. App. at 8a. The Government wisely refrains from invoking that counterintuitive distinction, preferring instead to rely on a purported subject-matter distinction—*i.e.*, antitrust, civil rights, and RICO must each be treated as *sui generis*. But it is impossible to assess whether any of those specific fields requires a departure from general conspiracy norms without first knowing what those general norms are. And the Government fails to address the perverse nature of its purported subject-matter distinctions, avoiding, for example, the question why one would ever construe a *criminal* conspiracy statute like § 371 more broadly than a *civil-rights* conspiracy statute like 42 U.S.C. § 1985.

Even framing the issue here in the narrowest possible terms, limited to § 371, the lower courts are still divided on the intracorporate conspiracy question. The approach adopted below conflicts with the First Circuit's approach in *United States v. Notarantonio*, 758 F.2d 777 (1st Cir. 1985). The Government attempts to sidestep this point by contending that *Notarantonio* is limited by another First Circuit opinion, *United States v. Peters*, 732 F.2d 1004 (1st Cir. 1984). That argument might wash if *Peters* had been decided after *Notarantonio*, but it was not. The argument thus fails for the same reason that

Plessy v. Ferguson, 163 U.S. 537 (1896) cannot be said to "limit" *Brown v. Board of Education*, 347 U.S. 483 (1954).

While the legal issues raised in this case are intriguing, they are far from academic. Indeed, as Hughes' *amici* point out, the scope of the conspiracy laws is a high-stakes issue for American business. By stretching the law of conspiracy—long "the darling of the modern prosecutor's nursery," *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (L. Hand, J.)—far beyond its traditional bounds, this case opens up vistas of potentially limitless corporate liability. The time has come to draw the line.

2. The Government next urges that Hughes' conspiracy conviction should not be affected by the acknowledged inconsistency between that verdict and the acquittal of LaRue, on whom the corporation's vicarious liability is necessarily based. *See* Opp. at 3, 16 n.6. Again, however, the Government sidesteps Hughes' central point. The Government simply recites the general rule that "'[i]nconsistency in a verdict is not a sufficient reason for setting it aside.'" Opp. at 11 (quoting *Harris v. Rivera*, 454 U.S. 339, 345 (1981) *(per curiam)*). But Hughes never challenged that general rule—only its newfangled extension into conspiracy law. The Government's approach toward this second issue, in other words, is precisely the opposite of its approach to the first—whereas it frames the first issue with a high degree of *specificity* in an attempt to distinguish away a number of circuit splits, here it frames the issue at a high level of *generality* in an attempt to obscure the traditional conspiracy exception to the general rule condoning inconsistent verdicts.

The Government's arguments on this second issue, thus, begin and end with this Court's decision in *Dunn v. United States*, 284 U.S. 390 (1932). The *Dunn* rule has long been the law of the land and, according to the Government, it should "'remain that way.'" Opp. at 13 (quoting *United States v. Powell*, 469 U.S. 57, 69 (1984)). But that exhortation again begs the question—just how far does the *Dunn* rule extend? As

explained in Hughes' petition, this Court has never extended it to conspiracy cases. To the contrary, notwithstanding *Dunn*, this Court—and the lower courts—have routinely applied a "rule of consistency" in conspiracy cases, holding that a conspiracy conviction cannot stand where all but one conspirator is exonerated. Pet. at 18-20. The Government attempts to distinguish Hughes' Supreme Court cases on the ground that they did not involve inconsistent verdicts rendered by a *jury*, but rather inconsistent verdicts produced by an *appellate court's* reversal of a conviction. But that distinction is utterly contrived: it is nowhere to be found in the relevant cases, which rely instead on the general principle that a conspiracy conviction *cannot stand as a matter of law* where all alleged conspirators but one are exonerated. It makes no difference whether that exoneration is effected by a jury or a court—indeed, if anything it makes *more* sense to reverse a conviction on inconsistency grounds where that inconsistency can be attributed to the jury, the factfinder of first instance.

And if further proof were needed that the *Dunn* rule and the "rule of consistency" are distinct, one has only to look at the solid wall of lower-court precedent applying the latter rule in the decades following *Dunn*. *See* Pet. 19-20. That wall began to crumble in the wake of this Court's decision in *Powell*, but that case did not involve conspiracy, and thus did not call the rule of consistency into question any more than did *Dunn* itself. While it is true, as the Government notes, that the Sixth and Tenth Circuits have not squarely *reaffirmed* the rule in light of *Powell*—neither court has had to go so far to resolve a case—that misses Hughes' point. Neither circuit has *abandoned* its longstanding adherence to the rule, so the pre-*Powell* cases endorsing it remain the law. *See Apodaca v. United States*, 188 F.2d 932, 940 (10th Cir. 1951); *United States v. Williams*, 503 F.2d 50, 54 (6th Cir. 1974).

The possibility that the Sixth and Tenth Circuits might eventually join the others in jettisoning the rule of consistency, moreover, affirmatively *supports* review here. The rule is a

venerable tenet of criminal procedure, and formed part of the legal background against which the conspiracy statute was enacted and re-enacted. At the very least, the rule should not be abolished without this Court's express approbation.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN J. HIGGINS
HUGHES AIRCRAFT
COMPANY, INC.
7200 Hughes Terrace
P.O. Box 80028
Los Angeles, CA 90090

KENNETH W. STARR
Counsel of Record
CHRISTOPHER LANDAU
KIRKLAND & ELLIS
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-5000

JOSEPH E. PAPELIAN
GENERAL MOTORS CORP.
3031 West Grand Boulevard
P.O. Box 33122
Detroit, Michigan 48232

Attorneys for Petitioner

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